SUPREME COURT, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-707

ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL AND REHABILITATION SERVICE, JOHN D. TWINAME, Administrator,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

GARY K. NELSON
Attorney General

Michael S. Flam and
James B. Feeley
Asst. Attorneys General
1624 West Adams Street
Phoenix, Arizona 85007

Attorneys for Petitioner

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Asst. Attorneys General
1624 West Adams Street
Phoenix, Arizona 85007

Attorneys for Petitioner

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DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL AND REHABILITATION SERVICE, JOHN D. TWINAME, Administrator,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Arizona State Department of Public Welfare, petitions for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered in

this case on September 14, 1971.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A) is not yet officially reported. The decision of the Department of Health, Education, and Welfare is set forth in Appendix B.

JURISDICTION

Jurisdiction to review by a Writ of Certiorari the judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered September 14, 1971 (Appendix C), is invoked under the provisions of Title 42, U.S.C. § 1316(a)(5) and Title 28, U.S.C. 1254(1). On the 17th day of November, 1971 the Petitioner's Petition for Rehearing was denied. Appendix D.

QUESTIONS PRESENTED

I

Is the Department of Health, Education, and Welfare's residency regulation (45 C.F.R. § 233.40) permissible under the Social Security Act?

II

Can the Department of Health, Education, and Welfare invalidate Arizona's method of computing disregarded earned income so as to control grant payment levels under the Aid to Families with Dependent Children (AFDC) program?

III

Can the Department of Health, Education, and Welfare invalidate Arizona's AFDC requirement that siblings residing in a relative's home be in the custody of that relative or the State Welfare Department?

IV

Can the Department of Health, Education, and Welfare impose an advisory council requirement for the Aid to Families with Dependent Children and Child Welfare Services (CWS) programs upon Arizona that is unauthorized by the Social Security Act?

CONSTITUTIONAL PROVISION INVOLVED

The Tenth Amendment to the United States Constitution is set forth in Appendix E.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Social Security Act of 1935, 49 Stat. 620, as amended (42 U.S.C. §§ 301-1394); Arizona Revised Statutes Annotated 1956, §§ 46-101 through 311; the Code of Federal Regulations, Title 45, Part II; and Arizona Assistance Payment Manual § 3-303 and

instructions accompanying Arizona State Department of Public Welfare Form 324 are set forth in Appendix F.

STATEMENT OF THE CASE

Pursuant to the Social Security Act, the federal government provides grants-in-aid to the states administering programs for supplying assistance to specified categories of the needy. Four programs are involved here:

(1) Old Age Assistance (OAA), under Title I of the Social Security Act, 42 U.S.C. § 301 through § 306;

(2) Aid to Families with Dependent Children (AFDC) and Child Welfare Services (CWS) under Title IV of the Social Security Act, 42 U.S.C. §§ 601 through 610, 620 through 626;

(3) Aid to the Blind (AB), under Title X

of the Social Security Act, 42 U.S.C. §§ 1201 through 1206; and

(4) Aid to the Permanently and Totally Disabled (APTD) under Title XIV of the Social Security Act, 42 U.S.C. §§ 1351 through 1355.

States choosing to receive these grants-in-aid are required to formulate plans for administering the assistance programs. The states have free reign in designating many aspects of the plan, such as establishing criteria for need and setting the level of benefits paid. The Act, however, prescribes certain requirements with which all state plans must comply. See 42 U.S.C. §§ 302(a), 602(a), 1202(a), 1352(a). State plans must be approved by the Secretary before they can be implemented. The Secretary

cannot approve any plan unless it meets these specified requirements and, in addition, does not impose as a condition of eligibility for assistance certain proscribed types of residence or citizenship requirements. 42 U.S.C. §§ 302(b), 602(b), 1202(b), 1352(b). If a plan fulfills the specified requirements and is free from the proscribed conditions, the Secretary must approve it.

Once approved a state plan is subject to the continuing scrutiny by the Secretary to assure continuing conformity to the federally imposed requirements and continuing freedom from the federally proscribed conditions, both on the face of the plan and in its administration. 42 U.S.C. §§ 304, 604(a), 1204, 1354. Should the Secretary call the continuing conform-

ity of the content or administration of the plan into question he must provide reasonable notice and opportunity for hearing to the state agency administering the plan. If, following a conformity hearing, the Secretary determines that the plan or its administration no longer meets federal requirements, he must terminate further federal payments to the state program until non-compliance is cured. Finally, if a state is dissatisfied with the Secretary's final decision, it may seek review of the decision in the appropriate Court of Appeals. 42 U.S.C. § 1316(a).

On July 8, 1970, the Secretary of Health, Education, and Welfare, acting through the Administrator, notified the Commissioner of the Arizona State Depart-

ment of Public Welfare that a hearing would be held on August 18, 1970 to determine whether four of Arizona's public assistance plans (Old Age Assistance; Aid to Families with Dependent Children and Child Welfare Services; Aid to the Blind; and Aid to the Permanently and Totally Disabled) were in compliance with federal requirements and, if not, whether federal grants-in-aid to those programs should be terminated. The Administrator's notice specified four issues to be considered at the hearing and noted that HEW and Arizona officials had been unable to reach agreement on those issues after extensive negotiations. These issues were published in 34 F.R. 11150-11151 and are:

1. Whether the State plans for the OAA, AFDC, AB and APTD programs,

which provide for termination of aid payments at the end of 90 days to recipients who are residents of the State but have been temporarily absent for such period, are in compliance with Section 202.3 of the HEW regulations, 34 Federal Register 8715, June 3, 1969.

2. Whether the State plan provision for the AFDC program with respect to the method of disregarding earned income, which provides for application of the amounts of such income to be disregarded first against the net income instead of the gross income, is in compliance with 45 C.F.R. § 233.20(a)(7)(i), and State Letter No. 1074 dated January 8, 1970.

3. Whether the State plan provision for the AFDC program that the caretaker-relative or the welfare department must have legal custody of a child whose siblings are also receiving AFDC in the home of their natural parent(s) in order for such child to be eligible for AFDC, is in compliance with Section 402(a)(10) of the Act, and whether such exclusion from eligibility for AFDC of similarly situated children on a basis unrelated to need is a reasonable classification consistent with the provisions and purposes of Title IV-A of the Social Security Act.

4. Whether the State plans for the AFDC and CWS programs pursuant to

Title IV, Part A or Part B of the Act, with respect to an AFDC-CWS advisory committee in the administration of the service programs for families and children, are in compliance with the requirements in 45 C.F.R. § 220.4.

The Conformity Hearing was governed by HEW regulations promulgated on July 29, 1970. 45 C.F.R. Part 213. The Administrator delegated the conduct of the Hearing to a Hearing Examiner. 45 C.F.R. § 213.21(a). The Hearing Examiner made his recommended findings and proposed decision on November 27, 1970 wherein he concluded that the Arizona plans were out of conformity in three of the four disputed areas. As to the fourth he held that HEW had not "sustained its burden of

proof." Following additional briefing and oral argument, the Administrator determined on January 26, 1971 that the Arizona plan did not conform with federal requirements with respect to all four issues. He, therefore, ordered discontinuance effective April 1, 1971 of federal grants-in-aid to those four programs for the duration of the non-conformity. The Administrator's decision automatically became the final decision of the Secretary. 45 C.F.R. § 213.32(b). On February 8, 1971 the Petitioner filed its Petition to Review the Secretary's final decision in the U. S. Court of Appeals for the Ninth Circuit and also filed a motion to stay enforcement and execution of the Secretary's termination order pending the Court of Appeal's decision. On February 18, 1971

HEW filed a motion approving Arizona's request for a stay on the proviso that the Court of Appeal would order expedited briefings and argument. The stay was granted on February 22, 1971. On September 14, 1971 the Ninth Circuit upheld the Administrator's decision. Petitioner timely moved for rehearing in banc and on the 17th day of November, 1971 the Court of Appeals denied the Petition. Appendix D. Thereafter, on November 19, 1971, Arizona moved for a stay of mandate pending application for certiorari in this Court. This motion is still pending.

This case comes before this Court with the State objecting to the interpretation HEW and the Court of Appeals for the Ninth Circuit have put on certain court decisions and on the Social Security Act in the four

areas of controversy. Further, the U. S. Court of Appeals for the Ninth Cirtuit has decided four very important questions in such a way as to conflict with applicable decisions of this Court requiring and exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1. THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE HAS PROMULGATED A RESIDENCY REGULATION, 45 C.F.R. § 202.3.[1] WHICH IS UNAUTHORIZED BY THE SOCIAL SECURITY ACT.

The authority of the Secretary of HEW to make rules and regulations can be found in 42 U.S.C. § 1302. This statute sets forth two conditions before a regulation can be promulgated. First, the regulation

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[1] Now 45 C.F.R. § 233.40

must be "necessary to the efficient administration of the function with which /the Secretary/ is charged under" the Social Security Act, and Second, the regulation must not be inconsistent with the Act.

The Petitioner contends 45 C.F.R. § 233.40, formerly interim regulation 45 C.F.R. § 202.3(b), is inconsistent with the Act; specifically 42 U.S.C. §§ 302(b)(2), 602(b)(1) and (2), 1202(b)(1) and 1352(b)(1). The Department of HEW maintains that their regulations on residency (45 C.F.R. 233.40) are obligatory under Shapiro v. Thompson, 394 U.S. 618 (1969).

> "These regulations are effective upon publication in the Federal Register. They are responsive to the decision of the U. S. Supreme Court in the case of Shapiro v. Thompson, April 21, 1969 . . . "

Because of this Regulation, Arizona's

residency provision, A.R.S. § 46-209, Appendix F, has been declared invalid by the Secretary and the Court of Appeals for the Ninth Circuit, thus, Federal Assistance for Arizona's welfare programs will terminate unless valid State law is ignored.

Arizona contends that its ninety-day termination policy for recipients who move out of the state is in accord with the Social Security Act and that this is the standard to which the state must conform rather than 45 C.F.R. § 233.40. It cannot be said that absence from a jurisdiction for three (3) months as opposed to continued presence is not a reasonable basis with which to differentiate recipients. The Arizona Statute herein does not suffer from the infirmity struck down in Shapiro, id., because no

intent is present to keep the needy from qualifying for welfare assistance where they live.

The federal rule is an impermissible usurpation of the authority vested solely in Congress. All that Congress requires under the Act is that the States refrain from setting a qualification for eligibility which exceeds the limits set forth in 42 U.S.C. §§ 302(b)(2), 602(b)(1) and (2), 1202(b)(1) and 1352(b)(1).

Regulations of federal agencies must be issued within the powers conferred by Congress. Congress has spoken in unambiguous terms on residency requirements. Since its policy does not restrict termination of those who have departed from the state a regulation forbidding such cutoffs cannot be imposed administratively.

Koshland v. Helvering, 298 U.S. 441, 447 (1936); Dixon v. U. S., 381 U.S. 68, 74 (1965). Here, HEW is seeking to legislate a definition of residency not contemplated by Congress and therefore beyond the scope of its rule-making power 42 U.S.C. § 1302. Following the federal rule clearly frustrates the intent of Congress. How can Arizona prevent the payment of dual grants? How can Arizona determine continuing eligibility? How can Arizona conduct case reviews and determine and provide the necessary supportive service required by the Act?

THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE MAY NOT IMPOSE UPON THE STATE OF ARIZONA A METHOD OF DISREGARDING EARNED INCOME FOR AFDC SO AS TO DEFEAT ARIZONA'S RIGHT TO SET GRANT EXPENDITURES.

2. Title IV of the Social Security Act

governs federal grants-in-aid to state programs for assistance to needy families with children. 42 U.S.C. §§ 601-610. Under 42 U.S.C. § 602(a)(7) and (8) Congress has provided a scheme of work incentive exemptions. The Secretary of Health, Education, and Welfare has promulgated regulations elaborating on the AFDC income disregards provisions pursuant to this statute by 45 C.F.R. § 233.20(a)(7)(i). This regulation states in part:

> "(7) Disregard of earned income; method. (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of 'earned income,' and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment."

Arizona's AFDC plan (Appendix F) requires that work related expenses be subtracted from gross income. Arizona applies the income disregards to the net income, while the HEW regulation requires the income disregards apply to gross income. Although the Court of Appeals does not dispute Arizona's power to set the level of benefits and the standard of need, Dandridge v. Williams, 397 U.S. 471 (1970), it has in effect allowed HEW to violate this principle. HEW's income disregard formula (45 C.F.R. § 233.20(a)) creates a higher grant level than the state's method of computation at the same percentage of need figure and thereby increases the effective level of benefits. This is in direct violation of King v. Smith, 392 U.S. 309 (1968) and Dandridge v. Williams, supra.

Furthermore, fiscal integrity of the AFDC program is a compelling consideration which renders the HEW regulation invalid. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969).

ARIZONA MAY REQUIRE ADDITIONAL CONDITIONS OF ELIGIBILITY SO LONG AS THEY DO NOT CONFLICT WITH THE SOCIAL SECURITY ACT.

3. Petitioner's Plan for administering Aid to Families with Dependent Children assistance contains the following provision in its Assistance Payments Manual (APM) § 3-401.3:

> "A relative of a natural parent who is an Aid for Dependent Children recipient cannot be approved for an Aid for Dependent Children grant on behalf of any of the children of said parent unless said relative or the /Arizona/ Department of Public Welfare has legal custody of the child or children named in the application. The custody order will be waived in cases

> where due to the illness of the parent it is the medical recommendation that responsibility for all of the children not be undertaken by the parent for a given period of time."

The Hearing Examiner found at the Administrative Conformity Hearing that the government did not sustain its burden of proof that APM §3-401.3 is not in compliance with 42 U.S.C. § 602(a)(10). However, the Administrator and the Court of Appeals have ruled otherwise. This is blatant error. Arizona has a legitimate interest in protecting needy and dependent children from being "farmed out" of their own homes to live with relatives solely for the purpose of circumventing Arizona's welfare grant limitations. This policy is in strict conformity with the federal objective under the AFDC program of maintaining and

strengthening family life. 42 U.S.C. § 601; APM § 3-401.3. Children who reside with specified relatives under 42 U.S.C. § 606 receive assistance; however, when a parent receives AFDC for a child, that child must reside with the parent or the relative must obtain custody through the Arizona courts. The purpose of this requirement is necessary for the child's protection, so that in case of medical emergency one capable of consenting to treatment will be available. Also, the requirement cures problems that arise when a child needs permission to marry, authorization to participate in school activities or permission to obtain a license (such as a drivers' license). It is simply common sense that the person with whom the child is living, especially if he seeks

public assistance for such a child's support, should be legally responsible for his well being.

In Wyman v. James, 400 U.S. 309, this Court spoke of the purpose of the AFDC program noting that:

> "The focus is on the child and, further, it is on the child who is dependent, there is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights." Id. at 318.

Likewise this Court should not relegate the child's right to reside with someone legally accountable for him, as Arizona requires (APM § 3-401.3) to a position secondary to what the Respondent theorizes are the rights of a grantee

relative.[2/]

2/ The State's position is summed up in the debates of the 87th Congress by the House resolved as a Committee of the Whole, March 15, 1962. Congressional Record, Vol. 108, Part III, 87th Congress, 2nd Session: "P.4267. Mr. Mills: The Bill is designed to improve, redirect and tighten up the federal and state poverty public assistance programs. The federal government must grant some latitude to the states to deal with them, particularly abuses in the ADC program. We believe it is high time that some concerted effort be made to get people off the rolls who can sustain themselves."
"P.4271. Mr. Chelf: The gentlemen (Mr. Mills) has made a very clear and wonderful statement on the subject matter. There is one question that has occurred to me as he spoke and that was that the welfare, the best interest, of the child was involved. Who would make the decision as to what would be in the best interest of the child, the State or on the federal level?"
"Mr. Mills: The State."

THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE CANNOT IMPOSE AN ADVISORY COUNCIL REQUIREMENT FOR AFDC AND CWS PROGRAMS UPON ARIZONA THAT IS UNAUTHORIZED BY THE SOCIAL SECURITY ACT.

4. The Department of Health, Education, and Welfare's requirement of a statewide advisory council for the Aid for Families with Dependent Children and Child Welfare Service programs is a clear demonstration of its attitude that the Social Security Act has empowered it, not only to approve state assistance plans, but also to dictate detailed procedures and standards even in absence of authorization in the Social Security Act. Requiring the State to create a statewide advisory council composed of one-third welfare recipients or their representatives and invest it with policy making authority makes a sham of

the State's power to create its own offices in derogation of the Tenth Amendment and violates the spirit of cooperative federalism upon which the entire welfare program is grounded. King v. Smith, supra.

HEW's position is that the State has no discretion in administering its own welfare program other than acceding to federal wishes:

> "Cooperation [between a state and the federal government] must be effectuated by an exercise of the powers which they severally possess and not by an exercise, through invasion of, or surrender by, one of them to the governmental power of the other. . . . A state may enter into contracts, but a state cannot, by contract or statute, surrender the execution or a share in the execution, of any of its governmental powers either to a sister state or to the federal government. . . ." Charles C. Stewart Machine Co. v. Davis, 301 U.S. 548, 612 (1937).

Certainly 42 U.S.C. § 1302 was not in-

tended to give the Secretary of HEW unbridled discretion. Its scope cannot be expanded by administrative regulation. The Secretary can only promulgate regulations which are responsive to some section of the Social Security Act, consistent with it and necessary to the efficient administration of its functions. Initially, it must be observed that this provision is not responsive to any section of the Act.[3/]

3/ Campbell, Federal Prohibition Administrator, et al. v. Galeno Chemical Co., et al., 381 U.S. 599, 610 (1930); "The limits of power to issue regulations are well settled. International R.R. Co. v. Davidson, 257 U.S. 506, 514 (1922). They do not extend a statute or modify its provisions." Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 322 (1961). "However, the fact is that the Board /Civil Aeronautics Board/ is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do."

Further the advisory council requirement is inconsistent with the intended purpose of the Social Security Act. Such a requirement is neither necessary nor does it contribute to the efficient administration of the Act. Deference to the administering agency should not be allowed to be transmuted into abdication of Congressional control by the device of regulations antithetical to the underlying statute.

All of the categorical assistance programs with which this appeal of conformity proceedings are concerned contain provisions requiring that the plan be administered by a single state agency.[4/] Likewise, HEW's own Handbook of Public Assistance Administration provides in Part II at

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[4/] 42 U.S.C. §§ 302(a)(3), 602(a)(3), 1202(a)(3), 1352(a)(3).

§ 2200 that a single state agency must administer or supervise the administration of the plans and that such agency will not delegate authority for exercising administrative discretion or supervision. Section 220.4 of 45 C.F.R. defeats this requirement.

The only advisory council provisions which are enumerated in the Social Security Act appear at 42 U.S.C. § 622(a)(C)(ii) and 42 U.S.C. § 1314(a)(f). These sections express the final will of Congress on the advisory council issue. Applying the rule of statutory construction, expressio unius est exclusio alterius, it is clear Congress did not intend that the Secretary of HEW force other advisory council requirements upon the states. Even under the most strained interpretation of

45 C.F.R. § 220.4 it is difficult to see how the regulation is necessary for the proper and efficient operation of the Social Security Act. In reality this section is a clear example of frustration of Congressional mandate by administrative regulation.

CONCLUSION

On the basis of the foregoing, Petitioner requests that the Court grant this Petition for Writ of Certiorari.

GARY K. NELSON
Attorney General

Michael S. Flam and
James B. Feeley
Assistant Attorneys General
1624 West Adams Street
Phoenix, Arizona 85007

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE, *Petitioner,* vs. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *Respondent.*	71-1177
MARICOPA COUNTY LEGAL AID CLIENTS, *Petitioners,* vs. ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE & DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *Respondents.*	71-1250

[September 14, 1971]

A Petition to Review a Decision of the Secretary of the Department of Health, Education and Welfare

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Before: KOELSCH, BROWNING and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Following a hearing, the Secretary of Health, Education and Welfare (the Secretary), acting through the Administrator of Social and Rehabilitation Service (the Administrator), determined that certain public-assistance plans of the State of Arizona failed to conform to requirements imposed by federal law and regulations. The Secretary ordered that federal financial support for

the affected Arizona public-assistance programs be discontinued for the duration of the nonconformities. In No. 71-1177, Arizona petitions this court for review of the Secretary's final decision, under 42 U.S.C. § 1316(a). Several organizations representing welfare recipients had participated in the hearing as intervenors. Those organizations seek to intervene as respondents in No. 71-1177. In addition, in No. 71-1250 intervenors[1] petition this court for review of a procedural ruling made during the conformity hearing and affirmed by the Secretary. We affirm the Secretary's determinations in No. 71-1177; we dismiss No. 71-1250 for want of jurisdiction.

A. *The Statutory Scheme.*

Pursuant to the Social Security Act (the Act), the federal government provides grants-in-aid to states that administer programs for supplying assistance to specified categories of needy individuals and families. Four such programs are involved here: (1) Old-Age Assistance (OAA) under Title I of the Act, 42 U.S.C. §§ 301-306; (2) Aid to Families with Dependent Children (AFDC) and Child Welfare Services (CWS) under Title IV, 42 U.S.C. §§ 601-610, 620-626; (3) Aid to the Blind (AB) under Title X, 42 U.S.C. §§ 1201-1206; and (4) Aid to the Permanently and Totally Disabled (APTD) under Title XIV, 42 U.S.C. §§ 1351-1355.

States choosing to receive these grants-in-aid are required to formulate plans for administering the assistance programs. The states have free rein in designing many aspects of the plans, such as establishing criteria for need and setting the level of benefits to be paid. The Act, however, prescribes certain requirements with which all state plans must comply. *See* 42 U.S.C. §§ 302(a), 602(a), 1202(a), 1352(a). State plans must be approved by the Secretary before they can be implemented. The Secretary cannot approve any plan unless it meets the specified requirements and, in addition, does not impose as a condition of eligibility for assistance under the plan certain proscribed types of residence or citizenship requirements. 42 U.S.C. §§ 302(b),

[1]We use the generic term "intervenors" to refer to all the parties before us in these two cases other than Arizona and the Department of HEW. We distinguish among the various intervening parties only in Part D of this opinion; *see* note 10 *infra*.

602(b), 1202(b), 1352(b).[2] If a plan fulfills the specified requirements *and* is free from the proscribed conditions, the Secretary must approve it.

Once approved, a state's plan is subject to continuing scrutiny by the Secretary to ensure its continuing conformity to the federally imposed requirements and its continuing freedom from the federally proscribed conditions, both on the face of the plan and in its administration. 42 U.S.C. §§ 304, 604(a), 1204, 1354. Should the Secretary call into question the continuing conformity of the plan or of its administration to federal requirements, he must provide reasonable notice and opportunity for hearing to the state agency administering the plan. If, following a conformity hearing, the Secretary determines that the plan or its administration no longer meets federal requirements, he must terminate further federal payments to the state program until the non-compliance is cured.

Finally, if a state is dissatisfied with the Secretary's final decision, it may file a petition for review of the decision in the appropriate court of appeals. 42 U.S.C. § 1316(a).

B. *The Background of This Case.*

1. *Administrative proceedings.*

On July 8, 1970, the Secretary of Health, Education and Welfare, acting through the Administrator, notified the Commissioner of the Arizona State Department of Public Welfare that a hearing would be held on August 18, 1970, to determine whether four of Arizona's public assistance plans (OAA; AFDC and CWS; AB; and APTD) were in conformity with federal requirements and, if not, whether federal grants-in-aid to those programs should be terminated. The Administrator's notice specified four issues to be considered at the hearing, and noted that HEW and Arizona officials had been unable to reach agreement on those issues after extensive negotiations.

The conformity hearing was governed by HEW regulations promulgated on July 29, 1970. 45 C.F.R. Part 213 (originally

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[2] 42 U.S.C. § 302(b) (Old-Age Assistance) also forbids any "age requirement of more than sixty-five years." 42 U.S.C. § 602 (AFDC and CWS) proscribes certain residency requirements only.

promulgated in 35 Fed. Reg. 12180).[3] The Administrator delegated the conduct of the hearing to a hearing examiner. 45 C.F.R. § 213.21(a). Pursuant to 45 C.F.R. § 213.15, the hearing examiner granted the petitions of the intervenors to participate in the conformity hearing. In their petitions, the intervenors listed 11 issues, in addition to the four specified in the Administrator's notice, which they sought to have considered at the conformity hearing. The conformity hearing was held on August 18 and 19, 1970. On August 18, the hearing examiner denied intervenors' request to expand the scope of the hearing to include the 11 additional issues, basing his denial on 45 C.F.R. § 213.14(d). In his Recommended Findings and Proposed Decision, submitted November 27, 1970, the hearing examiner concluded that the Arizona plans were out of conformity in three of the four disputed respects, but that as to the fourth, HEW had not "sustained its burden of proof." Following additional briefing and oral argument, the Administrator determined, on January 26, 1971, that the Arizona plans did not conform with federal requirements with respect to all four issues. He therefore ordered discontinuance, effective April 1, 1971, of federal grants-in-aid to those four programs for the duration of the nonconformities. The Administrator also approved the hearing examiner's denial of intervenors' motion to introduce additional issues. The Administrator's decision automatically became the final decision of the Secretary. 45 C.F.R. § 213.32(d).

2. *Proceedings before this court.*

On February 8, 1971, Arizona filed with this court its petition in No. 71-1177 to review the Secretary's final decision, and also a motion to stay enforcement and execution of the Secretary's termination order pending this court's decision. On February 18, HEW filed a motion agreeing with Arizona's request for a stay, provided that this court would order expedited briefing and argument. On February 22, we granted the stay and ordered the case expedited. On March 5, intervenors moved for leave to intervene in No. 71-1177, and this court granted that motion on March 22, "without prejudice to the right of the Department of Health, Education and Welfare to seek to limit intervenors to

[3] Unless otherwise noted, citations are to the Code of Federal Regulations as revised to January 1, 1971.

the issues presented by the review of the Arizona State Department of Public Welfare."

The petition for review in No. 71-1250 was filed by intervenors on February 22, 1971. It requested (1) review of that part of the Secretary's final decision denying them permission to raise additional issues at the conformity hearing and (2) permission to be heard as respondents on those issues raised by Arizona's petition for review in No. 71-1177. Arizona moved to dismiss intervenors' petition, and on March 10 this court ordered that the ruling on Arizona's motion to dismiss be reserved for the panel hearing the case on the merits. Point (2), however, has already been effectively disposed of by this court's order of March 22 in No. 71-1177, permitting intervenors to respond in that case. Accordingly, the only question left open under Arizona's motion to dismiss relates to point (1) of intervenors' petition.

The waters were subsequently and unfortunately muddied when, on April 9, Arizona filed a second motion to dismiss intervenors' petition in No. 71-1250.[4] On April 26, this court ordered that that motion to dismiss be denied as to point (1) of intervenors' petition, and granted as to point (2). HEW then moved to vacate the April 26 order, requesting us to reserve our ruling on Arizona's second motion to dismiss until after oral argument. Oral argument has since been held, and we have not yet ruled on HEW's motion to vacate.

The flurry of motions in these expedited cases has produced an unfortunate amount of confusion and an apparent contradiction between our March 22 order in No. 71-1177 and our April 26 order in No. 71-1250. To alleviate the confusion, we now grant HEW's motion to vacate our April 26 order in No. 71-1250. To remove any lingering doubts, we affirm our order of March 22, permitting intervention in No. 71-1177. Consequently, we need only dispose of Arizona's motion to dismiss intervenors' petition in No. 71-1250.

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[4] Different reasons for granting dismissal were given in Arizona's two motions to dismiss the petition in No. 71-1250. The reasons given suggest that Arizona's first motion to dismiss may have been directed primarily at point (2) of intervenors' petition and that Arizona's second motion may have been directed primarily at point (1). Nonetheless, both motions expressly sought dismissal of the entire petition, and we therefore treat each of them as directed at the entire petition.

C. *This Court's Jurisdiction to Entertain the Petition for Review in No. 71-1250.*

Intervenors petition for review of that part of the Secretary's final decision denying their request to raise additional issues at the conformity hearing. Arizona's second motion to dismiss asserts that we lack jurisdiction to entertain the petition under 42 U.S.C. § 1316(a). We agree.

Section 1316(a) states, in relevant part:

"(3) Any State which is dissatisfied with . . . a final determination of the Secretary under section 304, 604, 1204, [or] 1354 . . . of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination.

. . . .

. . . .

(5) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. . . ."

Thus Congress has conferred on this court jurisdiction to entertain petitions for review of the Secretary's decisions following conformity hearings under the Social Security Act. The express grant of jurisdiction is made in section 1316(a)(5), which does not expressly limit our jurisdiction to petitions filed by certain parties. However, subsection (5) is a part of § 1316, and subsection (3) supplies the context for subsection (5), and subsection (3) provides only for states[5] to file petitions for review. Considered in isolation, the grant of jurisdiction in subsection (5) is unqualified; so to read it, however, is to ignore subsection (3), a part of the same statute. We must and do read subsections (3) and (5) together, as by their express terms conferring jurisdiction on this court to entertain only petitions for review filed by *states* dissatisfied with a final decision of the Secretary.

The legislative history of section 1316 shows that Congress intended to confer jurisdiction only where the petition for review is filed by the state. The purpose of the section was to permit aggrieved states, for the first time, "to receive a judicial deter-

[5]The term "state" is defined in the Social Security Act itself. The term "includes the District of Columbia and the Commonwealth of Puerto Rico, . . . the Virgin Islands and Guam." 42 U.S.C. § 1301(a)(3).

mination of their disagreement with the Department [of HEW]" on the issue of nonconformity. 111 Cong.Rec. 2714 (1965) (remarks of Representative Curtis). *See also* Hearings on H.R. 6675. Before the Senate Finance Comm., 89th Cong., 1st Sess., Part I, at 215 (1965) (statement of the Secretary of HEW); H.R. Rep. No. 213, 89th Cong., 1st Sess., at 131 (1965); 111 Cong. Rec. 3066 (1965) (remarks of Senator Javits).

The courts of appeal are not courts of general jurisdiction; they have only the jurisdiction specifically conferred upon them by acts of Congress. *American Federation of Labor v. NLRB*, 1940, 308 U.S. 401, 404; *Turkel v. F.D.I.*, 6 Cir., 1964, 334 F.2d 844, 846; 9 Moore's Federal Practice ¶ 110.01, at 47 (2d ed. 1970); *cf. American Power Co. v. S.E.C.*, 1945, 325 U.S. 385, 389-90. Section 1316(a) confers upon us jurisdiction to entertain only petitions for review of the Secretary's final decisions that are filed by states. We therefore have no jurisdiction to entertain intervenors' petition in No. 71-1250, unless intervenors can demonstrate that jurisdiction is conferred on us by another source.

Intervenors attempt such a demonstration. Asserting that, as organizations of welfare recipients, they have suffered a "legal wrong" by the Administrator's denial of their request to broaden the scope of the conformity hearing, 5 U.S.C. § 702, intervenors argue that they have standing to seek judicial review and that they are therefore entitled to review in this court. Their argument is faulty. Admittedly the concept of standing is multifaceted and often ill-defined, *see, e.g.*, Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135, 1138-39 n. 11 (1970), but it has never been extended so far as to defeat the jurisdictional limitations placed upon this court by Congress. The elemental distinction between a litigant's standing and an appellate court's jurisdictional limitations is fatal to intervenors' argument. Intervenors rely extensively on *National Welfare Rights Organization v. Finch*, D.C. Cir., 1970, 429 F.2d 725, to buttress their theory. That case held that the National Welfare Rights Organization had standing to intervene in an HEW conformity hearing,[6] a holding reached by

[6] *National Welfare Organization v. Finch* was decided prior to the promulgation of the HEW regulations specifically authorizing intervention in conformity hearings. 45 C.F.R. § 213.15. Those regulations were promulgated in response to the *NWRO* case.

analogy to the law of standing to seek judicial review. That case did not involve a petition filed in this court under section 1316(a).[7]

At oral argument the question arose whether the Administrative Procedure Act, 5 U.S.C. § 703, taken together with 42 U.S.C. § 1316(a), confers jurisdiction upon this court.[8] Numerous courts have held, as we now hold, that section 703 does not confer upon a court of appeals any additional jurisdiction not expressly authorized by a separate statutory grant of power. *State of Wisconsin v. F.P.C.*, D. C. Cir., 1961, 292 F.2d 753, 755; *Schwab v. Quesada*, 3 Cir., 1960, 284 F.2d 140, 143; *Magnolia Petroleum Co. v. F.P.C.*, 5 Cir., 1956, 236 F.2d 785, 793; *City of Dallas v. Rentzel*, 5 Cir., 1949, 172 F.2d 122, 123. And see the dicta in *Pan American World Airways, Inc. v. C.A.B.*, D.C. Cir., 1968, 392 F.2d 483, 491-95; *Ove Gustavsson Contracting Co. v. Floete*, 2 Cir., 1960, 278 F.2d 912, 914. We need not decide whether intervenors can, under the Administrative Procedure Act, obtain review of the Secretary's denial in the district court.[9] *Cf. National Welfare Rights Organization v. Finch*, *supra* 429 F.2d at 736 (quoting Judge Lumbard's concurring opinion in *Rosado v.*

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[7] It should also be noted that the appeal in *NWRO* was not taken directly to the court of appeals. Rather, the court of appeals heard the case on appeal from the district court's denial of a preliminary injunction against the Secretary. 429 F.2d at 727.

[8] 5 U.S.C. § 703 states: "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. . . ."

[9] Of course, there is no reason why intervenors must seek review of the Secretary's denial of their request to broaden the conformity hearing. Intervenors wish to show that Arizona's public-assistance plans are in nonconformity with federal requirements in numerous additional ways. They need not have a conformity hearing to do this; they may ask the district court itself to declare that Arizona's plans are in nonconformity, and enjoin further administration of the nonconforming features. Such a course has precedent. *Bryant v. Carleson*, 9 Cir., 1971, ... F.2d ..... (No. 26,598, May 27, 1971). Indeed, considering the interests of the welfare recipients whom intervenors represent, "such a remedy would be preferable to a judgment ordering the cessation of the flow of federal [welfare] funds until the state plans complied with federal law." *Id.* at ..... (slip opinion at 10).

Wyman, 2 Cir., 1969, 414 F.2d 170, 181, *rev'd on other grounds*, 1970, 397 U.S. 397); *Rettinger v. F.T.C.*, D.C. Cir., 1968, 392 F.2d 454, 457. They cannot do so in this court.

Arizona's motion to dismiss the petition for review in No. 71-1250 must be granted.

D. *Intervenor D.N.A.'s Attempt to Raise the Administrator's Denial in No. 71-1177.*

By our order of March 22, 1971, intervenors were permitted to participate in the review in No. 71-1177, "without prejudice to the right of the Department of Health, Education and Welfare to seek to limit intervenors to the issues presented by the review of the Arizona State Department of Public Welfare." In its brief in No. 71-1177, intervenor D.N.A. argues that the Administrator improperly denied its request to raise additional issues at the conformity hearing[10]; for its argument on this point, intervenor D.N.A. adopts, pursuant to Rule 28(i), F.R.App.P., the arguments made in petitioners' opening brief in No. 71-1250. In short, intervenor D.N.A. seeks to raise in No. 71-1177 the same points which other intervenors sought to raise in No. 71-1250.

The critical portion of D.N.A.'s motion to intervene in No. 71-1177 reads as follows:

> "5. D.N.A. therefore seeks leave to intervene in this proceeding [No. 71-1177] in order to participate as a *party-petitioner* with respect to those issues on which it seeks reversal of the Administrator's decision and as a party-respondent with respect to those issues on which it seeks affirmance of that decision. ... ." (Emphasis added.)

Were we to grant D.N.A.'s request to intervene as a *party-petitioner* with respect to that issue, we would be letting in the back door precisely what we have already said should not enter

[10]Briefs were filed in No. 71-1177 by intervenors D.N.A., Inc., Welfare Clients, and by intervenors National Welfare Rights Organization and its Arizona affiliates. Only intervenor D.N.A. seeks to raise, in No. 71-1177, the point now in question. In a letter to the Clerk of this court, dated April 15, 1971, counsel for intervenors NWRO and affiliates clearly stated his intention to intervene in No. 71-1177 only in response to the points raised by Arizona's petition for review. Leave to intervene in No. 71-1177 was also granted to Maricopa County Legal Aid Clients; however, they have filed briefs only in No. 71-1250.

the front door and precisely what Congress has said does not belong in the house at all. Nor would it be proper to permit D.N.A. to introduce its controverted issue in its capacity as party-respondent, a capacity already granted by our March 22 order. Respondents respond; they do not raise issues not raised by the petitioner.

The Department of HEW has exercised its right "to seek to limit intervenors to the issues presented by the review of the Arizona State Department of Public Welfare." We limit intervention in No. 71-1177 to those issues raised by Arizona.

E. *Arizona's Petition for Review in No. 71-1177.*

The Administrator ruled adversely to Arizona with respect to each of the four issues considered at the conformity hearing; Arizona disputes those rulings. In addition, Arizona claims that it was denied procedural fairness during the conformity hearing in various ways. We treat these points *seriatim*.

1. *Arizona's Residence Requirements.*

All public-assistance programs administered by the Arizona State Department of Public Welfare are subject to the provisions of Arizona Rev. Stat. § 46-209, which states:

> "A. Any recipient of assistance desiring to reside outside the state for a period not to exceed ninety days shall execute a form provided by the state department [of public welfare]. The form shall require the recipient to express his intent as to establishing legal residence outside the state, or his intent to return to the state within ninety days. If it is the intent of recipient to establish legal residence outside the state, he may continue to receive assistance from this state while residing in another for a period not to exceed three months or until he meets the residence eligibility requirements for assistance in that state, whichever is lesser.
>
> B. A recipient of any assistance granted under this title shall not be continued on assistance after he has been absent from the state for three consecutive months."

These provisions have been incorporated in Arizona's plans for programs administering OAA, AFDC, AB, and APTD assist-

ance.[11] If an Arizona recipient of assistance under one of these programs leaves Arizona for longer than 90 days, he automatically loses his entitlement to continued assistance; upon his return to Arizona, he must reapply for assistance as a new resident, even if he intended all along to be absent from Arizona only temporarily. Absence from the state for more than 90 days thus raises, as Arizona insists it should, a conclusive presumption of intent to change residence.[12]

At the time of the conformity hearing, the following interim HEW regulation was in effect:

> "A State plan which conditions eligibility upon residence in the State may not exclude from eligibility any individual who resides in the State under the following definition:
>
> A resident of a State is one who is living in the State voluntarily and not for a temporary purpose, that is, with no intention of presently removing therefrom. A child is 'residing in the State' if he is making his home in the State. *Temporary absence from the State, with subsequent returns to the State, or intent to return when the purposes of the absence have been accomplished, shall not interrupt continuity of residence.*" 34 Fed. Reg. 8715 (1969), promulgating interim 45 C.F.R. § 202.3(b). (Emphasis added.)

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[11] Arizona State Dep't of Public Welfare, Assistance Payments Manual §§ 3-303.2 (OAA), 3-403.2 (AFDC), 3-503.2 (AB), 3-603.2 (APTD).

[12] Arizona's Opening Brief in No. 71-1177, states, at page 19: "[C]learly absence for 90 days . . . shows an intention to remove from the State permanently. Welfare recipients are not ordinarily prone to tour for months. A regulation that attributes to welfare recipients the habits of gypsies is simply a further indication of the bizarre approach to the problems of the poor promulgated by the Department of Health, Education and Welfare. Poverty severely limits mobility. To suppose that a family living on public assistance could afford to be away from their place of residence for three months is unrealistic in light of their financial condition. An assistance family that has been absent from a state for three (3) months *must* therefore be concluded to have given up residence there." (Emphasis in original.) Arizona makes no mention of possible motivations other than wanderlust for absences greater than 90 days. In particular, Arizona makes no mention of the plight of migrant farm workers or of Arizona residents caring for sick relatives in other states. We find no basis in the record to support a finding either that all absences over 90 days are motivated solely by wanderlust or that an absence of more than 90 days conclusively evidences an intention to give up Arizona residence. *Cf. Shapiro v. Thompson*, 1969, 394 U.S. 618, 631.

The interim regulation applies to State plans for administering OAA, AFDC, AB, and APTD assistance. *Id.* It has since been replaced by a substantially identical permanent regulation. 45 C.F.R. § 233.40 (promulgated by 35 Fed. Reg. 1779 (1970)).[13]

The HEW regulation and Arizona's automatic-termination provision are obviously inconsistent. The regulation states that any recipient must remain eligible for continued assistance despite his temporary absence from the state, so long as he has an "intent to return when the purposes of the absence have been accomplished." The Arizona requirement states that absence for 90 days by itself terminates eligibility, and that after 90 days any "intent to return" is entirely immaterial to continued eligibility, even though the recipient can prove that he had all along intended to return.

Arizona does not deny this inconsistency. Nor does Arizona deny that, if the HEW regulation is valid, the Arizona plans are out of conformity with federal requirements. Arizona's sole contention is that the HEW regulation is unauthorized by the Social Security Act and is therefore invalid.[14]

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[13] "A State plan . . . may not impose any residence requirement which excludes any individual who is a resident of the State. For the purposes of this section:

(a) A resident of a State is one who is living in the State voluntarily with the intention of making his home there and not for a temporary purpose. A child is a resident of the State in which he is living other than on a temporary basis. Residence may not depend upon the reason for which the individual entered the State, except insofar as it may bear upon whether he is there voluntarily or for a temporary purpose.

(b) Residence is retained until abandoned. Temporary absence from the State, with subsequent returns to the State, or intent to return when the purposes of the absence have been accomplished, does not interrupt continuity of residence."

[14] With respect to Arizona's residence requirements and the other provisions of Arizona's plans challenged by HEW, the only question is their literal conformity with valid federal requirements. Arizona's claim to the contrary notwithstanding, we need not decide whether "in the administration of the plan any . . . prohibited requirement is imposed, with the knowledge of [the] State agency, in a substantial number of cases." 42 U.S.C. §§ 304(1), 604(a)(1), 1204(1), 1351(1). Such questions would be appropriate if HEW were challenging Arizona's manner of implementing plan provisions that are in literal conformity with federal requirements. HEW is not.

The interim HEW regulation and its successor purport to be authorized by 42 U.S.C. § 1302, which states:

> "The . . . Secretary of Health, Education, and Welfare . . . shall make and publish such rules and regulations, *not inconsistent with this chapter*, as may be necessary to the efficient administration of the functions with which [he] is charged under this chapter." (Emphasis added.)

This section grants the Secretary "broad rule-making powers." *Thorpe v. Housing Authority*, 1969, 393 U.S. 268, 277 n. 28, which may extend to the promulgation of requirements binding on states in adopting or administering public-assistance plans. See *King v. Smith*, 1968, 392 U.S. 309, 317, 319 n. 16; *cf. Lewis v. Martin*, 1970, 397 U.S. 552, 556, 559. Arizona argues, however, that the Secretary's rule-making power does not extend to the regulation involved here, because the latter is inconsistent with the Social Security Act.[15] In particular, the regulation's definition of "residence" is, according to Arizona, inconsistent with the residency provisions contained in 42 U.S.C. §§ 302(b), 602(b), 1202(b), and 1352(b).

We find no inconsistency between these provisions and the regulation. Although sections 302(b), 602(b), 1202(b), and 1352(b) limit the residency requirements that a state plan may permissibly impose,[16] neither those sections nor any other section in the Act defines "residence" or a "resident." The Secretary has

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[15] Arizona does not contend that the regulation is not "necessary to the efficient administration of the functions with which [the Secretary] is charged under" the Social Security Act. 42 U.S.C. § 1302. Thus the only question raised under that section is the consistency of the regulation with the Act.

[16] 42 U.S.C. § 1352(b) states:

> "The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan——
>
> (1) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for aid to the permanently and totally disabled and has resided therein continuously for one year immediately preceding the application. . . ."

Sections 302(b), 602(b), and 1202(b) impose residence restrictions which are substantially identical.

chosen to define those terms in a regulation. His definition has the effect of further limiting the states' permissible choice of residency requirements. But we cannot find the Secretary's definition inconsistent with the letter or the spirit of the Act merely because it holds the states to a higher standard.[17] Compare *Lewis v. Martin, supra* (upholding an HEW regulation defining "income and resources," 42 U.S.C. § 602(a)(7), which places more stringent requirements on state AFDC programs); and see *United States v. Shreveport Grain & Elev. Co.*, 1932, 287 U.S. 77, 85. The "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co. v. F.C.C.*, 1969, 395 U.S. 367, 381, applies here. Accord *Lewis v. Martin, supra*, 397 U.S. at 559. No such "compelling indications" are to be found; indeed, the Secretary's definition of "residence" wholly comports with the Act's recognized policy of promoting "[l]iberality of residence requirement." *Shapiro v. Thompson*, 1969, 394 U.S. 618, 640, *discussing* 42 U.S.C. § 602(b), and *quoting* H.R. Rep. No. 615, 74th Cong., 1st Sess. at 24, *and* S. Rep. No. 628, 74th Cong., 1st Sess. at 35. We find the Secretary's definition not inconsistent with the Act, and we hold that the interim regulation and its permanent successor fall within the Secretary's rule-making power under 42 U.S.C. § 1302.

Arizona's reliance on the fact that the Secretary promulgated this regulation in response to *Shapiro v. Thompson, supra*, is misplaced. That the regulation was responsive to *Shapiro* is correct. *See* 34 Fed. Reg. 8715 (1969). It is also correct, as Arizona notes, that the regulation is sufficiently broad to invalidate not only state residence requirements of the sort struck down in *Shapiro*, but also quite distinguishable residence requirements, such as

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[17] The definition of "residence" contained in the presently disputed regulation did not spring fully armed from the forehead of the Secretary. As long ago as 1946, the Secretary had defined "residence" in terms of intent to remain in the jurisdiction. Handbook of Public Assistance Administration, Part IV, §§ 3620, 3650-52 (May 1, 1946). The Supreme Court has since noted that such a definition is "conventional." *Shapiro v. Thompson*, 1969, 394 U.S. 618, 636 n. 16.

Arizona's here.[18] Arizona errs in concluding, however, that because the regulation creates a remedy broader than the problem to which it was responsive, the regulation is invalid either *pro tanto* or in its entirety. Whatever may have motivated the Secretary to promulgate this regulation, the scope of his rule-making authority under the Social Security Act is limited only by 42 U.S.C. § 1302 and the Constitution. This regulation is within the scope of that authority. It makes no difference that the regulation was not narrowly tailored to deal only with state residence requirements like that in *Shapiro*.

Arizona cites *Wyman v. James*, 1971, 400 U.S. 309, for the proposition that "the U.S. Supreme Court has recognized the permissibility of eligibility requirements not expressly authorized by the Act." If Arizona means to suggest that *some* such eligibility requirements are permissible, we agree; if Arizona means that *all* are permissible then Arizona is wrong. The Supreme Court has never approved state eligibility requirements that conflict with the Act or with valid federal regulations issued pursuant to the Act, nor has any other federal court. The state provisions attacked in *Wyman v. James* were not alleged to conflict with the Act or with its implementing regulations; a constitutional challenge was made. The Court upheld the state provisions because, *as limited by valid HEW regulations*, the state provisions did not entail unconstitutional state action. See *Wyman v. James, supra*, 400 U.S. at 319, n. 6, and 321 (alternative holding).

The Secretary's determination that the Arizona provisions automatically terminating welfare eligibility following a 90-day absence are not in conformity with valid federal requirements must be affirmed.

2. *Disregard of earned income for AFDC.*

Title IV of the Social Security Act governs federal grants-in-aid to state programs for assistance to needy families with children—the Aid to Families with Dependent Children program (AFDC). 42 U.S.C. §§ 601-610. To obtain federal approval, a

[18] The state provision struck down in *Shapiro* denied initial eligibility for welfare assistance to residents who had not resided in the state for at least one year immediately preceding their applications for assistance. The Arizona regulation deals not with initial eligibility, but with continuing eligibility.

state AFDC plan must satisfy an elaborate set of requirements. *Inter alia*, the state plan must, with specified exceptions,

> "provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income. . . ."

42 U.S.C. § 602(a)(7). The exceptions require that certain "other income and resources" not be taken into consideration by the state—*i.e.*, that they be disregarded. In particular, a state plan must provide that the state agency administering the plan

> "(A) shall with respect to any month disregard—
>
> . . . .
>
> (ii) in the case of earned income of a dependent child not [a full- or part-time student], a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month. . . ."

42 U.S.C. § 602(a)(8)(A).[19]

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[19]The purpose of requiring that "other income and resources" be taken into consideration is to ensure that no Little Orphan Annie will receive public assistance if she has a Daddy Warbucks. The accompanying income-disregard provisions were given their present form by the Social Security Amendments of 1967, Pub. L. No. 90-248, Title II, Part 1, § 202(b), 81 Stat. 881-882. The provisions were redesigned "for the purpose of providing greater incentives for appropriate members of families drawing aid to families with dependent children (AFDC) payments to obtain employment so that they need no longer be dependent on the welfare rolls"; the incentive results from "exempt[ing] a portion of earned income for members of the family who can work." S. Rep. No. 744, 90th Cong., 1st Sess. (1967), in 1967-2 U.S. Code Cong. & Admin. News 2834, 2837. See generally *id.* at 2994-96.

The Secretary has promulgated regulations elaborating on the AFDC income-disregard provision, 45 C.F.R. § 233.20(a)(11), as well as on income-disregard provisions of other assistance programs under the Act, 45 C.F.R. §§ 233.20(a)(4)-(10).[20] The regulation here in dispute is generally applicable to all income-disregard provisions, although the dispute arises in the context of Arizona's AFDC plan. The disputed regulation, 45 C.F.R. §233.20(a)(7)(i), states:

> "(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD [Aid to the Aged, Blind or Disabled] must, as specified below:
>
> . . . .
>
> (7) *Disregard of earned income; method.* (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of 'earned income,' and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment."

Arizona's AFDC plan requires that work-related expenses first be subtracted from the individual's gross income and that the disregarded income then be subtracted from the difference. Thus Arizona applies the income disregard to *net* income, while the HEW regulation requires the income disregard to be applied to *gross* income. The Arizona AFDC plan and the HEW regulation are clearly in conflict. Arizona's sole contention is that the HEW regulation is invalid.

What we have said already about the Secretary's broad rule-making power under 42 U.S.C. § 1302 applies equally here. The Secretary is beyond any doubt empowered to promulgate uniform regulations governing the complexities of income-disregard accounting. The regulation here in question implements section 402(a)(8)(A) of the Act (42 U.S.C. § 602(a)(8)(A)); it is reason-

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[20] These other provisions are 42 U.S.C. § 302(a)(10)(A) (Old-Age Assistance); 42 U.S.C. § 1202(a)(8) (Aid to the Blind); 42 U.S.C. § 1352(a)(8) (Aid to the Permanently and Totally Disabled); and 42 U.S.C. § 1382(a)(14) (Aid to the Aged, Blind, or Disabled).

able on its face.[21] Since we must "give HEW the deference due the agency charged with the administration of the Act," *Lewis v. Martin, supra,* 397 U.S. at 559, we hold that the disputed regulation is valid.

Arizona suggests that the Secretary's income-disregard regulation infringes the state's "undisputed power to set the level of benefits and the standard of need," *King v. Smith, supra,* 392 U.S. at 334, and that it ignores the mandatory "recognition that the federal law gives each State great latitude in dispensing its available funds," *Dandridge v. Williams,* 1970, 397 U.S. 471, 478. The "power" and "latitude" possessed by the state are circumscribed by the scope of valid and applicable federal statutes and regulations. Within that circumscription the states are free to

[21] Arizona asserts that the calculational method it favors is the only method that makes "common sense." We find this assertion specious. HEW's Interim Policy Statement No. 4 of July 17, 1968, specified that the state, "in determining the amount of an individual's monthly earned income, will deduct all work expenses, personal and nonpersonal, from gross income" *before* applying the income disregard. Notice of Interim Policies and Requirements, § 3(D)(4); 33 Fed. Reg. 10231 (1968). That is, the Interim Policy Statement adopted the method that Arizona now espouses. Interim Policy Statement No. 4 became, with certain modifications, 45 C.F.R. Part 233, which incorporates the HEW regulation here in question. The modifications of the provisions of the Interim Policy Statement were made after "[v]iews of interested persons were requested, received, and considered, and in the light thereof. . . ." 34 Fed. Reg. 1394 (1969).

> "The following are the major changes: (1) The method for disregard of earned income has been modified. In arriving at the amount of earned income to be applied against the assistance budget the amount to be disregarded is to be deducted from gross income rather than from net income. Next, the amount allowed for work expenses is to be deducted."

Id. It is therefore clear that considerable care and reflection, on the part of persons thoroughly experienced in welfare administration, went into designing the method of income disregard, and that as a result the method espoused by Arizona was deliberately abandoned. On that ground alone we would be loath to find the method finally adopted by HEW to be utterly lacking in "common sense." In any event, we think it entirely reasonable for the Secretary to interpret "earned income" in the Acts' disregard provisions, 42 U.S.C. § 602(a)(8)(A), as referring to gross earned income. Nothing in the legislative history negates this broader reading of "earned income," and common usage supports it. See *Webster's Third New International Dictionary* 714 (1965):

tailor their assistance programs as they deem best. They may not, however, contravene valid federal requirements except at pain of losing their federal grants-in-aid, *King v. Smith, supra,* 392 U.S. at 333 n. 24; see *Oklahoma v. United States Civil Service Comm'n,* 1947, 330 U.S. 127, 143, 144. Moreover, the income-disregard provision here in question does not reduce Arizona's "great latitude in dispensing its available funds." It merely requires Arizona to make the calculations on the basis of which it allocates its AFDC funds in a particular way. Compare, *e.g., Ramos v. Montgomery,* S.D.Cal., 1970, 313 F.Supp. 1179, *aff'd mem.;* 1971, 400 U.S. 1003.

The Secretary's determination that the method used by Arizona to calculate AFDC income disregard is not in conformity with valid federal requirements must be affirmed.

3. *State-level advisory committee for AFDC and CWS.*

45 C.F.R. Part 220, Subpart A, requires that:

> "The State plans for AFDC and CWS pursuant to title IV, parts A [AFDC] and B [CWS] of the Social Security Act must, with respect to the administration of the service programs for families and children,
>
> (a) Contain provisions committing the State to meet the requirements in this subpart.
>
> . . ."

45 C.F.R. § 220.1. One such requirement, and the one disputed by Arizona, is the following:

> "An advisory committee on AFDC and CWS programs must be established at the State level and at local levels where the programs are locally administered, except that in local jurisdictions with small caseloads alternate procedures for securing similar participation may be established. . . ."

45 C.F.R. § 220.4(a).[22] Arizona's plan for administering AFDC and CWS assistance and services does not provide for an advisory committee, and is therefore in nonconformity with the require-

[22] The regulation goes on to state:

"The State plan must show that the advisory committee will:

(1) Advise the principal policy setting and administrative officials of the [State] agency and have adequate opportunity for meaningful participation in policy development and program

ment. As in the case of the preceding two issues, Arizona does not deny the inconsistency between its plan and the regulation, but attacks the regulation as invalid.

Arizona claims, once again, that the Secretary has exceeded his rule-making authority under 42 U.S.C. § 1302 in promulgating the regulation requiring an AFDC-CWS advisory council. Arizona's claim is two-fold: first, that the requirement is "inconsistent with the intended purpose of the Social Security Act," and second, that it is not "necessary to the efficient administration of the functions" with which the Secretary is charged under the Act.

Arizona's initial argument that the requirement is inconsistent with the Act is based upon 42 U.S.C. § 602(a)(3), which states that:

> "A State plan for aid and services to needy families with children must . . . either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan. . . ."

Arizona contends that the advisory committee would be *de facto* a second agency, in addition to the state's own properly designated public-assistance agency, resulting in more than "a single State agency" administering the state plan.

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administration, including the furtherance of recipient participation in the program of the agency.

(2) Include representatives of other State agencies concerned with services, representatives of professional, civic or other public or private organizations, private citizens interested and experienced in service programs, and recipients of assistance or services or their representatives who shall constitute at least one-third of the membership. Such recipients or their representatives must be selected in a manner that will assure the participation of the recipients in the selection process and that they are representative of recipients of assistance or services.

(3) Be provided such staff assistance from within the agency and such independent technical assistance as are needed to enable it to make effective recommendations.

(4) Be provided with financial arrangements, where necessary, to make possible the participation of recipients in the work of the committee structure."

The contention holds no water. As the Administrator's decision notes, "the committee's role is purely advisory and entails none of the administrative functions which fall within the province of the single State agency which is required by Section 402(a)(3) [42 U.S.C. § 602(a)(3)]." With or without the advisory committee, the responsibility for making the actual administrative decisions and for implementing them rests in a single set of hands—those of the state agency. The Secretary's regulation requires the advisory committee to "have adequate opportunity for meaningful participation in policy development and program administration, including the furtherance of recipient participation in the program of the agency." 45 C.F.R. § 220. 4(a)(1). But this requirement does not relieve the state agency of any of its administrative or authority or responsibility; it merely requires the agency to solicit and consider the advisory committee's views as a part of the agency's own decision-making process. The decisions themselves remain with the agency.

Arizona argues that the Secretary's regulation is inconsistent with the Act in another way. Arizona notes that certain provisions of the Act expressly require the creation of various advisory bodies. 42 U.S.C. §§ 622(a)(1)(C)(ii), 1314(a), 1314(f).[23] Arizona then reasons that "[t]hese sections express the final will of Congress on the advisory council issue. Applying the rule of statutory construction, *expressio unius est exclusio alterius*, it is clear Congress did not intend that the Secretary of HEW force other advisory council requirements upon the states."

We cannot accept this reasoning. The maxim *expressio unius* "is a product of 'logic and common sense,'" 2 Sutherland on Statutory Construction § 4916, at 415 (3d ed. Horack, 1943), and is properly applied only when the result to which its application leads is itself logical and sensible. K. Llewellyn, The Common Law Tra-

[23] Section 622(a)(1)(C)(ii) requires "an advisory committee, to advise the State public welfare agency on the general policy involved in the provision of day care services under the [State's CWS] plan." Section 1314(a) requires the Secretary to appoint an Advisory Council on Public Welfare "for the purpose of reviewing the administration of the public assistance and child welfare services programs . . . and making recommendations for improvement of such administration. . . ." Section 1314(f) permits the Secretary to appoint "such advisory committees as he may deem advisable to advise and consult with him in carrying out any of his functions under this chapter."

dition: Deciding Appeals, at page 521, (1960); *cf. id.* at 526 (paired maxims no. 20). Neither logic nor common sense supports applying the maxim here. The Social Security Act comprehends a complex aggregation of enactments, amendments, and repeals ranging over a period of 36 years. More than most statutes, the Act was and is responsive to the changing landscape of American Society; its beneficent purposes would be stultified by rigidly attributing to each Congressional attempt to improve the Act's responsiveness a concomitant Congressional intent not to permit further administrative improvements by those charged with the Act's implementation. *See* 2 Sutherland on Statutory Construction, *supra*, § 4917, at 421; 3 *id.* § 6604, at 287-288. Thus, this is another one of those instances in which "too much is claimed for" the maxim, *United States v. Barnes*, 1912, 222 U.S. 513, 519, and we decline to apply it here. We conclude that the Act's express provision for the creation of certain other advisory bodies is in no way inconsistent with the creation of the AFDC-CWS advisory committee by administrative regulation.

Arizona's second contention, that the advisory committee is not "necessary to the efficient administration of the [Secretary's] functions" within the meaning of 42 U.S.C. § 1302, is equally without merit. Congress expressly recognized the importance of adequate administrative methods to the success of AFDC-CWS programs. 42 U.S.C. § 602(a)(5), dealing with those programs, supplements the Secretary's general rule-making powers under section 1302; it states that:

> "A State plan for aid and services to needy families with children must . . . provide (A) such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan. . . ."

The advisory-committee requirement provides just such a method. That the Secretary in fact found the advisory committee "to be necessary for the proper and efficient operation of" state AFDC-CWS plans appears from his Interim Policy Statement No. 8, 33 Fed. Reg. 1023-1035 (1968). That he was entitled to so find follows from his responsibility for administering the various Social Security programs, and from his reasonable discretion in fulfilling that responsibility under 42 U.S.C. §§ 1302 and 602(a)(5). It also follows from the fact, as pointed out in the Administrator's decision, that

> "[i]n the past, the welfare system of this country has been subject to the criticism that it is closed and unresponsive to the needs of the very people it is designed to serve. In light of this fact, 45 C.F.R. § 220.4(a) [the advisory-committee requirement] represents a reasonable minimum requirement designed to open up lines of communication between those who administer the AFDC program and AFDC recipients."

Whether the advisory-committee requirement is in fact "necessary for the proper and efficient administration of the [state's] plan"—and Arizona asserts it is not—is not the question before us. The question is rather whether the Secretary found that it was necessary, and whether that finding was reasonable. He did, and it was.[24]

Finally, we note Arizona's claim that the advisory-committee requirement "makes a sham of the State's power to create its own offices in derogation of the Tenth Amendment and violates the spirit of cooperative federalism upon which the entire welfare program is grounded." The claim is frivolous. On the question of constitutionality, see *Oklahoma v. United States Civil Service Commission*, *supra*, 330 U.S. at 142-144, which is directly in point. See also *Sperry v. Florida*, 1963, 373 U.S. 379, 403. And compare the preamble to the Social Security Act (49 Stat. 620) with U.S. Const. art. 1, § 8, cl. 1 ("to provide for the general Welfare"). On the question of "cooperative federalism," which is of course no talisman,[25] see *King v. Smith*, *supra*, 392 U.S. at 316 & 333 n. 34;

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[24] 42 U.S.C. § 1315(a)(4) states that "The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive." Because the conformity hearing dealt specifically with Arizona's public-assistance programs, no facts were adduced bearing on the broader question whether the advisory-committee requirement itself was reasonably necessary. However, the evidence adduced concerning Arizona's programs would have been sufficient, as HEW's brief notes, to support a finding "that Arizona has failed to provide welfare recipients with an adequate opportunity to participate in the welfare system, and that the isolation of the Arizona state agency has made the system unresponsive to the needs of welfare recipients." Such a finding was unnecessary, since the only question was Arizona's literal compliance with the advisory-committee requirement.

[25] The phrase seems to have been first used by Professor Corwin: "It is this last type of National-State cooperation, effected by means of the Federal grant-in-aid, which best realizes the ideal of Cooperative Federalism." Corwin, *National-State Cooperation—Its Present Possi-*

Oklahoma v. United States Civil Service Comm'n, supra, 330 U.S. at 144.

The Secretary's determination that in failing to create an AFDC-CWS advisory committee, Arizona has contravened valid federal requirements must be affirmed.

4. *Arizona's legal custody requirement for AFDC.*

Arizona's plan for administering AFDC assistance contains the following provision:

> "A relative of a natural parent who is an Aid for Dependent Children recipient cannot be approved for an Aid for Dependent Children grant on behalf of any of the children of said parent unless said relative or the [Arizona] Department of Public Welfare has legal custody of the child or children named in the application. The custody order will be waived in cases where due to the illness of the parent it is the medical recommendation that responsibility for all of the children not be undertaken by the parent for a given period of time."

Arizona State Dep't of Public Welfare, Assistance Payments Manual § 3-401.3, ¶ 3. The questions involving this provision to be resolved at the conformity hearing were:

> "[1] whether the State plan provision for the AFDC program that the caretaker-relative or the welfare department must have legal custody of a child whose siblings are also receiving AFDC in the home of their natural parent(s) in order for such child to be eligible for AFDC, is in compliance with [42 U.S.C. § 602(a)(10)], and [2] whether such exclusion from eligibility for AFDC of similarly situated children on a basis unrelated to need is a reasonable classification consistent with the provisions and purposes of Title IV-A of the Social Security Act."

The hearing examiner's Recommended Findings concerning these two questions are, in their entirety, as follows:

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bilities, 8 The American Law School Review 687, 701 (1937). Professor Corwin was speaking of arrangements whereby "the national power to tax and spend is used to provide financial *inducement* to the States to exert their reserved powers in the furtherance of the legitimate objectives of national expenditure." *Id:* (emphasis added). Like a carrot, an inducement may have strings attached.

"The Government, which is the moving party herein, has not sustained its burden of proof that the exclusion provided for in section 3-401.3 of the State Assistance Manual is not in compliance with [42 U.S.C. § 602(a)(10)] and is an unreasonable and therefore invalid classification under the provisions and purposes of Title IV-A of the Act."

The Administrator declined to follow the Recommended Finding.[26] His conclusion, based on a review of the entire record, was

"that the Arizona 'legal custody' requirement violates the doctrine of 'equitable treatment' and renders the State's AFDC plan out of conformity with [42 U.S.C. § 602(a)(10)]."

It is clear from the Administrator's analysis and conclusion that he found Arizona's legal-custody provision out of conformity with 42 U.S.C. § 602(a)(10) only because he found it in violation of the "doctrine of equitable treatment."[27] It is equally clear from HEW's

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[26]The Administrators' reasoning was as follows:

"[The hearing examiner] did not explain what [his] conclusion as to 'burden of proof' meant. If [his] statement meant, as some of the third parties have interpreted it, that the Hearing Examiner only considered evidence introduced by counsel for the Government, then the Hearing Examiner was in error. . . . It would frustrate the spirit of the decision in [*NWRO v. Finch*, 1970, 429 F.2d 725] to allow . . . outside parties to introduce evidence, but then to disregard this evidence in formulating a decision."

Arizona does not argue that this reasoning is incorrect. In its only reference to the difference between the hearing examiner and the Administrator with regard to the legal-custody issue, Arizona's brief states:

"HEW's Administrator saw fit to overrule his own hearing officer's finding that the State's legal custody requirement was in compliance with applicable federal standards. Considering that the hearing officers' decision was based on first hand information, his opinion should be adopted by the Court."

Obviously, Arizona mistakes the import of the hearing officer's conclusion, treating it as a determination that, as a matter of law, the legal-custody requirement complies with federal requirements. Accepting Arizona's assertion at face value—as an attack on the substance of the Administrator's conclusions—we decline to discuss the merits of the "burden of proof" question.

[27]The HEW brief refers to the equitable-treatment doctrine as "a long-standing construction of the Act by HEW and all predecessor agencies responsible for the administration of the public assistance programs under the Act. Under the 'equitable treatment' doctrine, a state

brief in this case that the gravamen of HEW's objection to the legal-custody provision is its alleged nonconformity with that doctrine. Thus the questions on appeal, as posed by the briefs and arguments in this case, are (1) whether the "doctrine of equitable treatment," through 42 U.S.C. § 602(a)(10), imposes a valid federal requirement on state AFDC plans, and (2) if so, whether Arizona's legal-custody provision contravenes that requirement.

We decline to answer these questions as posed. Instead, we hold that Arizona's legal-custody provision is in direct conflict with the requirements of 42 U.S.C. § 602(a)(10), even without the intermediation of the equitable-treatment doctrine. Section 602(a)(10) requires "... that aid to families with dependent children shall be furnished ... to all eligible individuals. ..."

The purposes of AFDC programs are set out in 42 U.S.C. § 601:

> "For the purpose of encouraging the care of dependent children in their own homes *or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the

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plan for public assistance must contain only those eligibility conditions other than those specified in the Act which result in similar treatment of individuals in similar circumstances; further, the state may not impose exclusions, or differences in treatment, of such individuals if they bear no reasonable relationship to the purposes of the Act."

The doctrine is not expressed in any of the Act's provisions, nor has it been promulgated by regulation. *See* Note, *Welfare's "Condition X"*, 76 Yale L.J. 1222 (1967). Congress has validated one application of the doctrine, by writing the so-called "Flemming ruling" into the Act. Pub. L. No. 87-31, § 4, 75 Stat. 77 (1961) (adding 42 U.S.C. § 604(b)). See *King v. Smith*, *supra*, 392 U.S. at 322-23; Note, *supra*, 76 Yale L.J. at 1224-25. Recognition has occurred during a Congressional debate of "a requirement in the law that requires equal treatment of recipients and uniform administration of a program within a State." 113 Cong. Rec. 23055 (1967) (remarks of Rep. Wilbur Mills during debate on H.R. 12080, 90th Cong., 1st Sess., enacted as the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821). The doctrine has apparently been followed in its only judicial test. *Arizona v. Ewing*, D.D.C., 1953, Civil No. 2008-52 (unreported), *remanded with instructions to dismiss for lack of jurisdiction sub nom. Arizona v Hobby*, D. C. Cir., 1954, 221 F.2d 498. At least one court has more recently declined to rule on the doctrine's validity. *Russo v. Shapiro*, D.Conn., 1969, 309 F.Supp. 385, 389 n. 3.

parents *or relatives which whom they are living* to help maintain and strengthen *family* life and to help such parents *or relatives* to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children." (Emphasis added.)

42 U.S.C. § 606 defines the terms used in the AFDC provisions of the Act. It contains the following definitions:

"(a) The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, *and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece,* in a place of residence maintained by one or more of such relatives as his or their own home. . . .;

(b) The term 'aid to *families* with dependent children' means money payments with respect to . . . a dependent child or dependent children, and includes (1) money payments . . . to meet the needs *of the relative with whom any dependent child is living* . . .

(c) The term 'relative with whom any dependent child is living' means the individual *who is one of the relatives specified in subsection (a) of this section and with whom such child is living.* . . ." (Emphasis added.)

Thus, a "needy child . . . who has been deprived of parental support or care" is just as much a "dependent child" within the meaning of the Act when he lives with a relative as when he lives with a parent. 42 U.S.C. § 606(a). A "famil[y] with dependent children" is just as much a "family" within the meaning of the Act when it consists of the child and a relative other than a parent as when it consists of the child and a parent. *Id.* §§ 601, 606(b).

And a relative qualifies as a "relative with whom any dependent child is living" within the meaning of the Act whenever his or her relationship to the child is one of those specified and the child is actually living with him or her. *Id.* § 606(c). A similar symmetry between "parents" and "relatives" inheres in the Act's purposes. "[T]he care of dependent children" is to be equally encouraged whether the dependent child lives with a parent or a relative. *Id.* § 601. "[F]amily life" is to be "maintain[ed] and strengthen[ed]" just as much when a dependent child lives with a relative as when he lives with a parent. *Id.*

The provisions quoted above thus make it perfectly clear that the Act views the AFDC eligibility of a relative with whom a child is living exactly the same as the eligibility of the child's parent. If a child is "dependent" and if he lives with either a parent or a relative, then the parent or relative is eligible for AFDC assistance on behalf of the child. The Act no more permits any otherwise eligible category of relatives to be automatically rendered totally ineligible for AFDC assistance, on the basis of conditions not found in the Act, than it permits any category of parents to be. And the Act does not permit the latter. See *King v. Smith, supra.*

Although the precise question under discussion is, so far as our research has shown, one of first impression, dicta in other cases support our reading of the Act. Referring to 42 U.S.C. §§ 606(a) and (b), one court has noted that

> "the definitions contain no limitation on eligibility by reason of the fact that one, who is otherwise a 'dependent child,' resides in a household with or without one or more other siblings or other persons. Nor do the definitions or any other portion of the Act vest in any state the authority to embroider upon the definition of 'dependent child,' so as to insert conditions and limitations beyond these imposed by Congress."

Williams v. Dandridge, D. Md., 1969, 297 F. Supp. 450, 455 (footnote omitted), *rev'd on other grounds,* 1970, 397 U.S. 471. Accord, *Dews v. Henry,* D. Ariz., 1969, 297 F. Supp. 587, 591. And in *King v. Smith, supra,* 392 U.S. at 330, the Supreme Court found it unlikely

> "that Congress, at the same time that it intended to provide programs for the economic security and protection of *all* children, also intended arbitrarily to leave one class of destitute

children entirely without meaningful protection." (Emphasis in original.)

Arizona's legal-custody requirement therefore, conflicts with the treatment of relatives' AFDC eligibility required by the Act. It automatically and categorically denies AFDC eligibility to "[a] relative of a natural parent who is an Aid for Dependent Children recipient" unless that relative (or the Arizona State Department of Public Welfare) has legal custody of the child. Thus, suppose a mother has two children, one of whom lives with her, and suppose the mother receives AFDC assistance. If the other child is living with his or her "grandfather, grandmother, brother, sister, . . . uncle, aunt, first cousin, nephew, or niece," 42 U.S.C. § 606(a), that relative cannot receive AFDC on behalf of the child unless the relative (or the Department of Public Welfare) has legal custody of the child. The Act does not countenance a state's imposition of such a condition.

Arizona makes several claims on behalf of its requirement, with none of which we agree. *First*, Arizona asserts that the requirement is "[i]n strict conformity with the federal Aid to Families with Dependent Children program objectives 'to help maintain and strengthen family life,'" because it discourages the splitting-up of parents and children. As we have pointed out, however, a "family" within the meaning of the AFDC provisions of the Act does not comprehend only the child and his parents. A household consisting of the child and his "grandfather, grandmother," etc., is as much a "family" within the meaning of the Act as is a household consisting of the child and his mother or father. *See especially* 42 U.S.C. §§ 601, 606(b), quoted *supra*. This point is particularly critical in this case, since, as the evidence showed and as the Administrator pointed out, "a common, if not the predominant cultural pattern among Mexican-Americans and Indians in Arizona is the 'extended family.' Under this cultural system, it is common for children to be sent to live for short periods of time with relatives. In order to receive AFDC, however, these relatives would have to undertake the burdensome and costly task of acquiring legal custody, which may invest the resulting situation with a degree of permanence that is unacceptable to everyone concerned." Thus Arizona's legal-custody requirement falls especially heavily on Arizona's Mexican-American and Indian minorities.

Second: Arizona asserts that it has a legitimate interest in conserving its public-assistance funds so that it may assist as many unrelated families to as great an extent as possible. It wishes to encourage dependent children to live in the same household, in order to take advantage of "the greater ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments." *Dandridge v. Williams*, 1970, 397 U.S. 471, 479-480. Legitimate though that interest is, it cannot prevail over the requirements of the Act. Arizona's "interest in economically allocating its limited AFDC resources may be protected by its undisputed power to set the level of benefits and the standard of need, and by its taking into account in determining whether a child is needy all actual and regular contributions to his support." *King v. Smith, supra*, 392 U.S. at 334. Arizona may also protect that interest by imposing a fixed upper limit on the total amount of money any one family unit may receive, *Dandridge v. Williams, supra*, or by paying to each AFDC recipient a fixed percentage of his actual needs, *Ward v. Winstead*, N.D. Miss., 1970, 314 F. Supp. 1225, 1233, *appeal dismissed for untimely filing*, 1971, 400 U.S. 1019; *cf. Rosado v. Wyman*, 1970, 397 U.S. 397, 413-414. Arizona may not protect that interest by declaring ineligible for AFDC assistance persons whom Congress has said shall be eligible.[28]

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[28]Arizona cites *Dandridge v. Williams, supra*, for the proposition that its legal-custody requirement is valid, quoting the following language: "We see nothing in the federal statutes that forbids a State to balance the stresses which uniform insufficiency of payments would impose on all families against the greater ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments. The strong policy of the statute in favor of preserving family units does not prevent a State from sustaining as many families as it can, and providing the largest families somewhat less than their ascertained per capita standard of need. 397 U.S. at 479-480. The Maryland maximum-grant limitation upheld in *Dandridge* is, however, quite different from the Arizona legal-custody requirement. The Supreme Court found that "the practical effect of the Maryland regulation is that all children, even in very large families, do receive some aid. We find nothing in 42 U.S.C. § 602(a)(10) (1964 ed., Supp. IV) that requires more than this. So long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated." 397 U.S. at 481. The evil of Arizona's legal-custody requirement is that, under it some eligible families and some eligible children receive no aid.

Third: Arizona argues the practical desirability of having children living with adults legally responsible for them, in order "that in case of medical emergency one capable of consenting to treatment, whether the Welfare Department or a relative, will be available," and in order to cure "problems that arise when a child needs permission to marry, authorization to participate in school activities or permission to obtain a [driver's] license." These claimed practical advantages are of questionable significance; certainly nothing in the record suggests that they ought to be given great weight. And in any event, weighty or not, they do not justify deviation from the Act's requirements.

Fourth: Arizona invokes the special interest that a state has in regulating "the marriage and family relationship." But such regulation is not in question here. What is in question is whether Arizona can use federally provided funds in a manner at odds with the conditions specified by Congress for their use.

Arizona's AFDC plan does not fulfill the mandatory condition "that aid to families with dependent children shall be furnished with reasonable promptness to *all* eligible individuals." 42 U.S.C. § 602(a)(10) (emphasis added).

5. *Arizona's attack upon the conformity-hearing process.*

Arizona contends that it was denied procedural fairness during the conformity hearing. Recognizing that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union," *South Carolina v. Katzenbach*, 1966, 383 U.S. 301, 323, Arizona finds a requirement of procedural fairness in other sources. In particular, Arizona claims that the Tenth Amendment "embodies the State's constitutionally nonexplicit fundamental rights that are protected by the Federal Constitution." Arizona also argues that the Ninth Amendment reserves to its citizens "fundamental individual protections not enumerated in" the Constitution, and that Arizona is acting as *parens patriae* of its citizens in this case; thus, the argument concludes, Arizona "is the only one with standing to protect [its citizens'] rights in this unique situation where the damage to individuals arises from unfair treatment of the State as the representative of its people."

Although Arizona may in appropriate situations assert claims as *parens patriae* on behalf of its citizens, *see, e.g., Hawaii v. Standard Oil Co. of California*, 9 Cir., 1970, 431 F.2d 1282 and cases cited, *cert. granted*, 1971, 401 U.S. 936, the situation here is not an appropriate one. The very basis of this proceeding is HEW's attempt to assure that Arizona citizens receive benefits conferred upon them by Congress; the federal government, through the Department of HEW, is itself acting as *parens patriae* in seeking to vindicate individual rights created by federal statute and jeopardized by Arizona. In such a situation, Arizona cannot act as *parens patriae* against the federal government. See *South Carolina v. Katzenbach, supra*, 383 U.S. at 324 and cases cited.

As for Arizona's Tenth Amendment claim, we find *Oklahoma v. United States Civil Service Commission, supra*, apposite. That case involved a hearing the purpose of which was, like the conformity hearing here, to determine whether the state had adhered to conditions attached to grants of federal funds. *See* § 12 of the Hatch Act, 54 Stat. 767-770 as amended (now codified at 5 U.S.C. Ch. 15). Responding to Oklahoma's claim that its sovereignty had been violated, the Court noted that

> "The Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.' [quoting *United States v. Darby*, 1941, 312 U.S. 100, 124.] . . . A hearing was had, *conformably to § 12*, and the conclusion was reached that Mr. Paris' active participation in politics justified his removal from membership on the Highway Commission. Oklahoma chose not to remove him. We do not see any violation of the state's sovereignty in the *hearing* or order." 330 U.S. at 143 (emphasis added).

Like Arizona here, Oklahoma was a party to the administrative hearing; unlike Arizona, Oklahoma did not allege specific procedural shortcomings. Notwithstanding this distinction, we think the *Oklahoma* case refutes Arizona's reliance on the Tenth Amendment. To go further and read the Tenth Amendment as incorporating *specific* guarantees of procedural fairness would exceed even an expansive reading of the Amendment's proper scope. At very most the Amendment reserves certain powers to the states, *cf.*

Sperry v. Florida, 1963, 373 U.S. 379, 403; it assuredly does not incorporate a Bill of Procedural Rights for the states.

Since Arizona's constitutional objections to the hearing procedures are not tenable, the procedures of which Arizona complains must be upheld if they are properly authorized by statute or regulation.[29] We now turn to Arizona's specific complaints.

First: The pre-hearing notice given Arizona specified only the issues to be treated, and did not disclose the nature of the evidence or the identity of the witnesses to be presented. Arizona applied to the Administrator for a continuance in order to be able to discover who and what would be presented by HEW. The application was denied by the hearing examiner. Arizona now contends that only the Administrator is authorized to grant or deny continuances, 45 C.F.R. § 213.12,[30] and that the hearing examiner violated that regulation in doing so instead. However, 45 C.F.R. §§ 213.21(a), 213.22(a)(1), and 213.22(a)(5) clearly authorize the hearing examiner to grant and deny continuances.[31] We cannot say, on the basis of the record before us, that the hearing examiner

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[29]The intervenors note that a possible source of general procedural-fairness requirements in the conformity-hearing process might be the statutory requirement of "reasonable notice and opportunity for hearing." 42 U.S.C. §§ 304, 604(a), 1204, 1354. Since Arizona does not make that argument, we decline to discuss it.

[30]"§ 213.12—*Time of Hearing.* The hearing shall be held not less than 30 days nor more than 60 days after the date notice of the hearing is furnished to the State, unless the Administrator and the State agree in writing to holding the hearing at another time."

[31]"§ 213.21—*Who Presides.* (a) The presiding officer at a hearing shall be the Administrator or, at his discretion a hearing examiner assigned under 5 U.S.C. 3105 or 3344.

"213.22—*Authority of Presiding Officer.* (a) The presiding officer shall have the duty to conduct a fair hearing, to avoid delay, maintain order, and make a record of all the proceedings. He shall have all powers necessary to accomplish these ends, including, but not limited to, the power to:

(1) Change the date, time, and place of the hearing, upon due notice to the parties.

. . .

(5) Rule on motions and other procedural items on matters pending before him."

abused his discretion in denying Arizona's application for a continuance. Nor does it appear that Arizona was seriously prejudiced: At the conclusion of the hearing the examiner asked counsel for Arizona if they needed a continuance in order to respond to evidence adduced at the hearing, and counsel said they did not.

Second: The hearing examiner confined himself to taking evidence and ruling on the conformity of Arizona's plans with the Secretary's regulations. He declined to rule on Arizona's contentions that HEW's policies and regulations contravened the Act. Arizona now claims that "[b]y forcing the State into a limited forum that was unable to consider the merits of its case, the Department of Health, Education, and Welfare effectively denied Arizona the opportunity of challenging it, thereby ignoring the fundamental ethic of fair play. . . ." The administrative forum, however, was not limited to the conformity hearing. Before reaching a final decision, the Administrator held a hearing for the sole purpose of permitting Arizona to argue its contentions that the HEW regulations were invalid. Arizona filed extensive briefs in support of those contentions. The Administrator's final decision expressly treated the question of the regulations' validity. Arizona was not denied the opportunity to argue all of its contentions during the administrative proceedings.

Third: Arizona claims that the participation of welfare recipients as intervenors in a conformity hearing is unauthorized by the Act. This amounts to an assertion that 45 C.F.R. § 213.15(b)(1)[32] is beyond the Secretary's broad rule-making power under 42 U.S.C. § 1302. It is not. See especially *National Welfare Rights Organization v. Finch*, D.C. Cir., 1970, 429 F.2d 725. Arizona's references to dicta in *Rosado v. Wyman*, 1970, 397 U.S. 397, 406, 426, are inapposite, since that case antedated the Secretary's promulgation of 45 C.F.R. Part 213.

Fourth: Arizona seems to argue that because it admitted noncompliance with certain HEW regulations, no evidentiary hearing was necessary, and that holding one denied Arizona procedural fairness. Not only is the argument illogical; its premises are also

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[32] "Other individuals or groups may be recognized as parties, if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute."

at odds with Arizona's insistence that it should have been granted a continuance and with Arizona's claim that HEW bore "the burden of showing that [Arizona's] non-compliance based on residency . . . is involved in a substantial number of cases." Arizona also asserts that wholly irrelevant testimony was continually admitted into evidence, thereby turning the hearing into "a two-day diatribe covering the full spectrum of conceivable social ills . . ." Since Arizona does not point to any specific evidence whose improper introduction was prejudicial, we decline to respond to the assertion.

Fifth: During the conformity hearing the examiner ruled that witnesses testifying adversely to Arizona could "decline to give the names of the individuals whom they are referring to in their testimony." The ruling was intended to protect welfare recipients referred to against any possible retaliation by the Arizona State Department of Public Welfare in the form of "extra strict enforcement of legal requirements." Arizona now argues that the ruling hampered its ability to determine the veracity of the testifying witnesses. We have reviewed the testimony affected by this ruling, and we find no significant prejudice to Arizona. If believed, the testimony tended to show that the various features of the Arizona public assistance plans here in issue operated so as to make it substantially more difficult for eligible Arizona residents to obtain public assistance. But, as Arizona has recognized, this case presents for decision only the questions whether the disputed provisions of Arizona's plans are, on their face, in conformity with federal requirements. The Administrator did not, and we do not, examine the actual administration of those plans. Thus the testimony of which Arizona complains is at best irrelevant, and not prejudicial.

Sixth: Arizona claims that the HEW regulations governing "Practice and Procedure for Hearings to States on Conformity of Public Assistance Plans to Federal Requirements," 45 C.F.R. Part 213, were not adopted in accordance with the notice requirements of 5 U.S.C. § 553, and that they are therefore invalid. Section 553(b) renders the notice requirements inapplicable "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." In promulgating the conformity-hearing regulations, the Secretary stated:

> "Notice of proposed rule making has been dispensed with, . . . since notice and public procedure thereon are impracticable. Hearings with respect to the conformity of the plans of a number of States . . . have been scheduled on various days in August and September 1970 and it is urgent that the parties to such hearings know forthwith the rules of procedure and practice that are applicable to the conduct of such hearings."

35 Fed. Reg. 12180 (July 29, 1970). The stated reasons are "good cause" for foregoing notice. *Cf. Buckeye Cablevision, Inc. v. F.C.C.*, D. C. Cir., 1967, 387 F.2d 220, 228 n. 34. Indeed, the Secretary obviously acted with Arizona's legitimate interests in mind. The rules were validly promulgated.

In No. 71-1250, the proceeding is dismissed.

In No. 71-1177, the decision is affirmed.

The stay order issued by this court on February 22, 1971, is vacated.

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APPENDIX B

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE

Social and Rehabilitation Service

IN THE MATTER OF THE
ARIZONA CONFORMITY HEARING

TO ALL PARTIES

Attached is a copy of my final decision dated January 26, 1971. In accordance with 45 CFR 213.32(d) I am serving it on all parties and amici on this date.

/s/John D. Twiname
John D. Twiname
Administrator

Washington, D.C.
January 26, 1971

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Social and Rehabilitation Service

IN THE MATTER OF:	
THE CONTINUANCE OF GRANTS TO THE STATE OF ARIZONA UNDER TITLES I, IV (PART A), X, AND XIV OF THE SOCIAL SECURITY ACT.	DECISION OF THE ADMINISTRATOR

This matter raises the question of whether the State of Arizona's plans for Old Age Assistance (OAA), Aid to Families with Dependent Children (AFDC), Aid to the Blind (AB), and Aid to the Permanently and Totally Disabled (APTD) no longer comply with the requirements set forth in the pertinent sections of the Social Security Act and whether Arizona is entitled to continue to receive Federal

funds for the operation of these public assistance programs. The Arizona State Department of Public Welfare is the State agency charged with the administration of the aforementioned programs. The Secretary of Health, Education, and Welfare has delegated to me the authority and responsibility for the administration of the public assistance titles of the Social Security Act.[1] Pursuant to this authority, I notified the Department of

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1. This delegation of authority by the Secretary of HEW to the Administrator of the Social and Rehabilitation Service is set forth in the Federal Register of January 25, 1969. 34 F.R. 1279-1288, amended in 34 F.R. 18561 (November 21, 1969). Cf. also 45 CFR 213.32(d) (July 29, 1970). The authority for this delegation is provided in Section 6 of Reorganization Plan No. 1 of 1953, 67 Stat. 631, 5 U.S.C. Appendix.

Public Welfare on July 8, 1970 that serious questions existed as to whether the State plans involved complied with certain requirements of Federal law and regulations.[2] At that time, I offered the State an opportunity for a hearing, as provided in Sections 4, 404(a), 1004, and 1404 of the Act and 45 CFR 201.5 (now 45 CFR 201.6), on the question of whether further Federal grants could be made to the State under the titles of the Act involved. This notice specified the four issues to be considered at the hearing. By order of July 27, 1970, I designated Mr. Edward K. Adelsheim to preside over

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2. As required by 45 CFR 213.14(a), this notice was published in the Federal Register of July 10, 1970. 35 F.R. 11150-11151.

the hearing and to certify and transmit to me the entire record of the proceedings, including his recommended findings and proposed decision.

The hearing took place on August 18 and 19, 1970 in San Francisco. Besides SRS and the State agency, several organizations participated as parties to the hearing.[3] I have now reviewed the official transcript of the proceedings, the exhibits received in evidence, the briefs of the parties, the Hearing Examiner's recommended

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3. They were: the National Welfare Rights Organization (NWRO), the Arizona Affiliates of NWRO, the Maricopa County Legal Aid Society, the Welfare Rights Organization of Arizona, Inc., and the Dinebeiina Nahiilna Be Agaditahe, Inc. (DNA). The Papago Legal Services and the Center on Social Welfare Policy and Law of Columbia University participated as amici curiae.

findings and proposed decision and the comments thereon of the parties. Additionally, on January 20, 1971, I heard the oral argument of the parties to the hearing on the question of the validity of the Federal regulations involved. Having consulted with the Secretary regarding this matter, I am now prepared to issue my final decision.

Before reaching the substantive issues raised by the hearing notice, it is first necessary to deal with a host of procedural matters raised both by the State and by the third parties to the hearing.

Arizona has consistently objected that the Secretary of HEW has no authority to delegate his responsibility for making the final decision on whether a particular

State plan conforms to the requirements of Federal law to the Administrator of SRS. The State of Nebraska raised the same question at its conformity hearing. In my decision in the Nebraska conformity hearing, issued January 18, 1971, I set out in detail the considerations that lead me to find unquestionable the Secretary's authority to delegate this responsibility. It is not necessary to reiterate those considerations here.

Arizona also questions the validity of the Federal regulations establishing the rules of procedure for conformity hearings under the public assistance titles of the Social Security Act. These regulations, 45 CFR 213., et seq., were published in the Federal Register of

July 29, 1970, to be effective immediately upon publication. 35 F.R. 12182-12185. Arizona's objection is that their promulgation was in violation of that section of the Administrative Procedure Act, dealing with administrative rule-making, 5 U.S.C. 553, which provides that such regulations shall not become effective until thirty (30) days after their publication, thus allowing interested parties an opportunity to comment upon them. However, Arizona does not deal with the exception to this requirement set forth in 5 U.S.C. 553(b)(A) for "rules of agency organization, procedure, or practice." Because I consider the regulations in question to fall within this statutory exception, I find Arizona's objection to

their validity on this ground to be untenable. Moreover, in making its argument, Arizona failed to demonstrate how it was in any way prejudiced by the fact that the regulations were effective upon publication.

Arizona further argues that it has been denied due process of law in that it has been given no opportunity to challenge the validity of the Federal regulations involved. It apparently bases this objection on its reading of 45 CFR 201.6 and the fact that the Hearing Examiner, in his proposed decision, ruled that he had not been delegated authority to rule on the validity of Federal regulations. In this, the Hearing Examiner was correct, but this fact does not mean that the State

stands to suffer the loss of Federal funds for failing to follow a Federal regulation it has had no opportunity to challenge. The State may challenge the validity of a particular regulation in the briefs filed in connection with the hearing, which become part of the record reviewed by me in issuing a final decision. The function of the Hearing Examiner is to preside over the actual hearing and to take evidence as to factual matters bearing upon the issues. The decision issued by the Hearing Examiner is a proposed decision, not the final decision. The State has a forum for presenting its challenges to Federal regulations in the briefs filed for my consideration. An additional forum is provided if the State seeks judicial

review pursuant to Section 1116(a)(3) of the Act. The fact that the State is not provided with still another forum before the Hearing Examiner cannot be said to constitute a denial of due process of law.

Arizona has also raised certain objections relating to the participation of third parties in conformity hearings. Arizona first objects that there is no need for such third parties to participate where the issues involved are purely "legal" ones. The provisions of the Federal regulations permitting the participation of third parties were promulgated in response to the decision of the United States Court of Appeals for the District of Columbia in NWRO v. Finch (CA. Nos. 23,787 and 23,890, June 9, 1970). In

finding that organizations representing recipients could participate as parties to public assistance conformity hearings, the Court of Appeals in no way conditioned its result on the nature of the issues raised at a particular hearing. The relevant Federal regulation, 45 CFR 213.5(b)(1), provides that an organization is to be admitted as a party if they have an interest that "is within the zone of interests to be protected by the governing Federal statute." Arizona objects that the various third parties were improperly admitted, because they lacked the requisite interest specified in 45 CFR 213.15(b)(1). I cannot agree. From the record as a whole, including the requests to participate which these parties

filed with the Hearing Examiner, it is apparent that these organizations represented various groups of public assistance recipients and unquestionably had an interest within the range of interests protected by the Social Security Act. I, therefore, cannot conclude that it was error on the part of the Hearing Examiner to admit them as parties.

Arizona also objects to the Hearing Examiner's denial of its request for a continuance. Arizona apparently feels that, under 45 CFR 213.12, only the Administrator could rule on its request. I cannot agree. The fact that, under 45 CFR 213.12, the Administrator and the State agency can agree in writing to a change in the date of the hearing in no

way deprived the Hearing Examiner of his power, under 45 CFR 213.22(a)(5) to rule on the State's motion. Arizona's request for a continuance, dated July 29, 1970, addressed to the Administrator, was referred to the Hearing Examiner, who had been appointed at that time. Given the fact that the issues raised by the hearing notice had been the subject of extensive negotiations with the State, I cannot find the Hearing Examiner's denial of this motion to be an abuse of his discretion, and would have reached the same result had the motion been considered by me as an original matter. Similarly, I am not persuaded by Arizona's objection to the sufficiency of the hearing notice. Again, given the fact that the hearing

notice only raised issues which the State had been aware of for some time, I cannot see how Arizona was in any way prejudiced by the fact that the hearing notice did not catalogue the evidence to be presented at the hearing, nor by the fact that discovery procedures were not available to enable Arizona to ascertain the nature of the Government's evidence, which consisted mainly of documents which were readily available to the State.

Finally, the State argues that it should not be determined to be out of compliance, because it has not been shown that the alleged issues of nonconformity affect a "substantial number of cases." This is merely a restatement, in somewhat different form, of the argument that a State's

public assistance plan need only substantially comply with the requirements of the Social Security Act. As I have indicated on two previous occasions, under 45 CFR 201.6(a)(1), "substantial compliance" is not the standard by which a State's public assistance plan is to be tested against the requirements of the Social Security Act. The considerations that lead me to this conclusion are set forth in detail in my decision in the Indiana conformity hearing dated January 18, 1971 and need not be reiterated here.

There remains one further procedural objection, raised by two of the third parties, DNA and Maricopa Legal Aid Society. At the hearing, these intervenors requested that the Hearing Examiner expand the scope

of the hearing to include several conformity issues which had not been raised in the hearing notice. The Hearing Examiner ruled, correctly, that he lacked authority to do this, as 45 CFR 213.14(d) vests the Administrator with the sole authority to determine the issues to be considered at such a hearing. In their briefs, these parties argue that third parties were granted the right to introduce additional issues by the decision of the Court of Appeals for the District of Columbia in NWRO v. Finch, CA Nos. 23787 and 23,890 (June 9, 1970), citing the following passage from the court's opinion:

> "Similarly, without participation in the administrative hearing, issues which appellants here might wish to raise about the character of the State's

> plans may have been foreclosed as a topic for review." (Slip opinion, p. 22).

Accordingly, these intervenors take the position that the Hearing Examiner should have used his authority, under 45 CFR 213.14(a) and allow the new issues to be considered. I cannot agree: 45 CFR 213.14 permits the Hearing Examiner to waive the rules only with respect to matters pending before him, and issues not contained in the hearing notice were not, strictly speaking, pending before him. Moreover, the Hearing Examiner correctly interpreted 45 CFR 213.14(d) as vesting the sole authority for determining the issues at a hearing in the Administrator. Finally, this interpretation of the regulations is in no way inconsis-

tent with the opinion in NWRO v. Finch. In briefs filed in that case, the question of the right of third parties to introduce new issues into conformity hearings was clearly put in issue. At the time the decision was issued, NWRO had been allowed to participate as amicus, but had not been granted the right to raise additional issues. Yet, the Court of Appeals carefully indicated that its decision only enlarged the right of participation already accorded NWRO "to the extent of an additional right to present live witnesses and to cross-examine witnesses for other parties." (Slip opinion, p.27). Accordingly, I find that third parties do not have the right to raise issues at a conformity hearing under the public assist-

ance titles of the Social Security Act, which are not raised in the hearing notice. Having dismissed the various procedural objections raised by the parties, I proceed to the substantive issues considered at the hearing.

Issue No. 1 - Residency - OAA, AFDC, AB, APTD

The question raised here is whether the Arizona plans for all its Federally assisted public assistance programs are in compliance with the requirements set forth in Sections 2(b), 402(b), 1002(b), and 1402(b) of the Social Security Act, as they have been interpreted in 45 CFR 202.3. The provisions cited above, which relate to the adult programs (OAA, AB, APTD), are substantially the same and provide

that the Secretary "shall not approve any plan which imposes, as a condition of eligibility for aid ... (1) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for aid and has resided therein continuously for one year immediately preceding the application for aid and has resided therein continuously for one year immediately preceding the application ..." The provision applicable to the AFDC program, Section 402(b), although worded somewhat differently, is to the same effect.

There is no factual dispute involved here. 45 CFR 202.3, the regulation in

issue here, precluded State public assistance plans from imposing a residence requirement, as a condition for eligibility, which excluded "any individual who resides in the State." In 45 CFR 202.3(b), there is set forth a definition of residence, for public assistance purposes, which provides, among other things, that: "Temporary absence from the State, with subsequent returns to the State, or intent to return when the purposes of the absence have been accomplished, shall not interrupt the continuity of residence."

Section 46-209.B of the Arizona Revised Statutes provides that a recipient of public assistance is not to continue to receive such assistance after a continuous absence from the State of three

months. This statutory provision has been incorporated in Section 3-303.2 of the APA Manual, which indicates that assistance will be discontinued after a continuous absence of 90 days, even if the recipient files at the County Welfare Department a statement that he intends to return and intends to retain his Arizona residence. Arizona has admitted that these provisions are in effect and are being applied. Furthermore, the fact that the provisions of Arizona law mentioned above are squarely in conflict with 45 CFR 202.3 is not disputed.

Arizona has chosen instead to argue that 45 CFR 202.3 is an invalid interpretation of the relevant provisions of the Social Security Act. 45 CFR 202.3 was

promulgated in response to the Supreme Court's landmark decision in Shapiro v. Thompson, 394 U.S. 618 (1969). There, the Court dealt with cases challenging one-year durational residence requirements (the maximum permitted by applicable Federal law) as conditions for the receipt of public assistance. The Court found that such provisions effectively created two classes of people - those who had lived in a State for a year and those who had not - and subjected these two classes to different treatment. Moreover, as the provisions in question operated to abridge the right to travel of the members of that class denied public assistance eligibility, the Court held that the States would have to show a compelling

justification for such difference in treatment. Finding such compelling justification to be lacking, the Court ruled that the durational residence requirements were in conflict with the equal protection clause of the Fourteenth Amendment.

Arizona argues that 45 CFR 202.3 is invalid for several reasons. Its first contention is that the regulation contains a definition of "residence" which is not authorized by the Social Security Act. In this section of its argument, Arizona places great reliance on the fact that, in deciding Shapiro, the Supreme Court specifically declined to rule on the validity of the provisions of the Social Security Act involved, which are the very ones involved here, finding that they

merely permitted, but did not require the durational residence provisions. Therefore, Arizona's argument continues, assuming that the Secretary does have the authority to set a Federal definition of residence for public assistance purposes, the provisions of the Act which permit durational residence requirements are still operative as definitive guides to the Secretary in establishing the content of that definition. As 45 CFR 202.3 excludes durational residence requirement, it is inconsistent with operative provisions of the Social Security Act.

As I will indicate later, resolution of the question raised by this portion of the State's argument is not necessary to the disposition of the precise issue in-

volved. Yet, because Arizona has raised a question of vital importance to the administration of the public assistance titles of the Social Security Act, I feel compelled to resolve it. The question raised is whether the Secretary's authority in issuing regulations to define terms contained in the Act is limited solely by the operative terms of the Act, or whether the Secretary may also issue such regulations to comply with decisions of the Supreme Court interpreting the United States Constitution. Arizona's position is that, in issuing such regulations, pursuant to his authority under Section 1102, the Secretary must listen only to Congress and look only to the precise terms of the Act, and has no role whatsoever in enforc-

ing the Supreme Court's decree in Shapiro. I cannot agree.

The net effect of Arizona's position would be to require the Secretary to continue to approve State public assistance plan provisions which the Supreme Court has found to be unconstitutional. While it is true that, in issuing interpretative regulations, the prime focus of the Secretary must be on the intent of the Congress, this does not mean that he must completely disregard a clear and unequivocal decision of the Supreme Court which arose in the public assistance context. The doctrine of the separation of powers has never been construed to mean this.

Arizona further contends that the Shapiro case dealt only with durational residence

requirements for initial eligibility, and said nothing whatsoever about continuing eligibility.

I agree that the issue raised by the hearing notice concerns continuing, not initial, eligibility, and the propriety of the definition of residence per se contained in 45 CFR 202.3. In regard to this issue, Arizona has raised questions as to whether "residence" is a Federal term that the Secretary may define at all and as to what the proper content of that definition is to be. As indicated earlier, the decision in Shapiro is only peripherally relevant to the resolution of this question. Before Shapiro, the content of any durational residence requirements for initially establishing residence. After

Shapiro, residence could only be defined in terms of residence per se, which had been defined by HEW long before the decision in Shapiro was rendered.[4] The fact remains that, under the Arizona provisions involved here, a recipient could be terminated after three months' continuous absence, but be eligible immediately upon his return to Arizona and Arizona would not be violating the mandate of Shapiro. In such a case, however, the provisions of

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4. Thus, the content of the definition of residence per se contained in 45 CFR 202.3 in large part merely reiterates principles previously set forth in Part IV, Sections 3610-3665 of the Handbook of Public Assistance Administration, particularly Section 3620. At the time of the Shapiro decision, the Handbook was the official medium for issuing official interpretations of the terms and requirements of the Social Security Act.

45 CFR 202.3 would be violated.

After due consideration, I must conclude both that the Secretary has the authority to issue a definition of "residence" to be used in connection with Federally supported public assistance programs and that the definition contained in 45 CFR 202.3 is correct.

The Social Security Act contains many terms which have common meanings as used in everyday speech, but which require precise, uniform definition when used in the statute. One need not look very far for examples of such terms. Two examples are "resources" and "fair hearing," used in Sections 402(a)(2) and 402(a)(4) of the Act. Perhaps the closest parallel to the present case can be found in the word

"parent," which is used in Section 406(a). "Parent" is a word with a familiar everyday meaning, and a precise legal significance in all the States. Yet, as the Supreme Court has demonstrated in two cases, King v. Smith, 392 U.S. 309 (1968) and Lewis v. Martin, 397 U.S. 552 (1970), when "parent" is used in Section 406(a), it becomes a term that requires a uniform, precise definition to insure that Congressional intent is carried out.

Arizona here questions that element of the definition of residence which precludes a State from conclusively presuming that residence has been abandoned simply because a recipient has been absent from the State for a certain period of time. Yet, the very reason for including this element

in the definition demonstrates the need for a uniform, Federal definition of residence for public assistance purposes.

This element of the definition is designed to prevent situations where needy individuals could be found to be residents of no one State and, therefore not eligible for public assistance in any State. For example, assume that an Arizona public assistance recipient journeys to another State to care for a sick relative, and files a statement that he intends to return and retain his Arizona residence. After three months, Arizona would automatically terminate his assistance eligibility. Yet, because he had announced an intention not to establish residence in the State where the sick relative resided,

he would probably not be found to be a resident of that State and would be ineligible to receive public assistance there. The regulation's definition is designed to avoid such a result in a program which Congress enacted to promote the general welfare.

It should be pointed out what 45 CFR 203.3 does not require. It does not require a State to furnish public assistance to individuals who have taken up permanent residence in other States. The regulation only bars the States from making temporary absences operate as conclusive presumptions that residence has been abandoned. In other words, after three months continuous absence, Arizona could use other objective evidence to show abandonment of

residence, or could require the recipient to demonstrate his intention to return. It is the automatic nature of the termination involved here that violates 45 CFR 202.3. Nor does 45 CFR 202.3 unduly hinder the State's efforts to prevent the fraudulent receipt of payments from two States by some individuals. There are other, more precise measures available to the State to serve this interest. Accordingly, for the reasons set forth herein, I find that the Arizona plans for OAA, AFDC, AB, and APTD fail to conform to the requirements of 45 CFR 202.3.

Before leaving this issue, however, I would like to clear up some questions raised about the extent of the Secretary's authority to issue interpretative regula-

tions pursuant to Section 1102 of the Act. Arizona has argued that the Secretary has authority, under Section 1102, only to issue such regulations as are absolutely necessary to enable him to administer the Act. Moreover, the State urges that Federal regulations interpreting provisions of the Act should do little more than mirror the Act's provisions. I cannot agree.

The responsibility for administering the Social Security Act is a difficult one to carry out. The Congress could not possibly foresee every complexity entailed in administering a program in which 54 jurisdictions participate. Therefore, it enacted Section 1102 to grant the Secretary a wide range of discretion to ensure that the intent of the Congress was carried out. Thus, Section 1102 is a broad

grant of authority to the Secretary to interpret the requirements of the Social Security Act and to provide uniform Federal definitions of those terms in the Act that require such definition. I cannot construe Section 1102 in the narrow fashion urged by the State of Arizona.

The fact that Section 1102 of the Social Security Act represents a broad grant of authority to the Secretary of HEW has been recognized by the Supreme Court as well. Cf. Thorpe v. Housing Authority of Durham, 393 U.S. 268, 277, n.28 (1969); King v. Smith, 392 U.S. 309 (1968). The Supreme Court has also indicated that great weight is to be attached to the construction put on a Federal statute by the administrative agency charged with its

execution. Red Lion Broadcasting v. FCC, 395 U.S. 367, 381 (1967); Udall v. Tallman, 380 US 1, 16 (1965); Zemel v. Rusk, 381 U.S. 1, 11 (1965), and has extended this deference to HEW's interpretations of the Social Security Act. Lewis v. Martin, 397 U.S. 552 (1970); Rosado v. Wyman, 397 U.S. 397 (1970).

Issue No. 2 - Disregard of Earned Income for AFDC

Section 402(a)(8)(A)(ii) of the Social Security Act provides that, in computing the assistance payments for certain AFDC recipients, the States must disregard certain amounts of "earned income." The question presented by this issue relates to the proper method for computing this "earned income-disregard." The Secretary's interpretation, contained in State Letter

No. 1074 and 45 CFR 233.20(a)(7)(i), is that the earnings exemption is to be applied to an individual's gross income, before work-related expenses are deducted. Arizona's method, evidenced by the Instructions for filling out State Form DPW-324, the Assistance Budget Work Sheet, first deducts work-related expenses from gross income, and then applies the income disregard to net income in order to determine the recipient's available income for the purpose of computing the assistance payment.

Both at the hearing and in the briefs, Arizona conceded that its method conflicted with that prescribed by Federal regulations. The sole dispute between the parties is whether 45 CFR 233.20(a)(7)(i) is a proper interpretation of the Social Security Act.

The income disregard provision, Section 402(a)(8)(A)(ii), was added to the Social Security Act by the Social Security Amendments of 1967. In its briefs, the State relies on long passages from the House Report on the 1967 Social Security Amendments to demonstrate that their method for computing the income disregard is the one required by legislative history. I cannot agree. Passages from the House and Senate Reports on the 1967 Amendments can be used to support both the government's and the State's position equally well. Read in its entirety, the legislative history only reveals that Congress, in all probability, never considered the question raised here.

The Secretary has issued his official

interpretation of Section 402(a)(8)(A)(ii) in 45 CFR 233.20(a)(7)(i). In reaching the final determination as to the proper method for computing the earned income disregard, Many considerations came into play. Past practice in the program of the Aid to the Blind was considered. Another weighty factor was the fact that the income disregard clause was intended by Congress to operate as an incentive for AFDC recipients to engage in gainful employment or in work training programs and that application of the disregard to gross income would provide recipients with a greater economic incentive. Additionally, the words "earned income" are commonly used to refer to gross income.

After consideration of these and other

factors, the Secretary mandated the method set forth in 45 CFR 233.20(a)(7)(i). This was what the Secretary had decided was the most logical construction to be put on the words of Section 402(a)(8)(A)(ii), and, as I have indicated earlier, this construction of the statute is entitled to great weight. This in no way implies that the Secretary's interpretation was the only logical one, or even the most desirable. It certainly was not the most desirable from Arizona's viewpoint.

The point is that 45 CFR 233.20(a)(7)(i) is completely justifiable from the terms of the Act. In all the briefs filed here, Arizona has not shown that the interpretation is unreasonable, capricious or

completely arbitrary. It has simply shown that Arizona does not agree with it. This is not sufficient reason for finding a Federal regulation inconsistent with the Social Security Act. The Secretary of HEW has the responsibility for interpreting provisions of the Act, and this authority is limited only by the requirement that it not be exercised in an arbitrary fashion or in a way inconsistent with the Act. 45 CFR 233.20(a)(7)(i) has not been shown to be such an arbitrary exercise of power. Accordingly, I am constrained to find that Arizona has failed to comply with the requirements of the Social Security Act as stated in Issue No. 2 in the notice of the hearing.

Issue No. 3 - Legal Custody - AFDC

As stated by the hearing notice, this issue concerns:

> "Whether the State plan provision for the AFDC program that the (sic) that the caretaker-relative or the welfare department must have legal custody of a child whose siblings are also receiving AFDC in the home of their natural parent(s) in order for such child to be eligible for AFDC, is in compliance with Section 402(a)(10) of the Act and whether such exclusion from eligibility for AFDC of similarly situated children on a basis unrelated to need is a reasonable classification consistent with the provisions and purposes of Title IV-A of the Social Security Act."

The provision of the Arizona AFDC plan called into question here is Section 3-401.3 of the APA Manual, which provides:

> "A relative of a natural parent who is an Aid for Dependent Children recipient cannot be approved for an Aid for Dependent Children grant on behalf of any of the

children of said parent unless said relative or the Department of Public Welfare has legal custody of the child or children named in the application. The custody order will be waived in cases where due to the illness of the parent it is the medical recommendation that responsibility for all of the children not be undertaken by the parent for a given period of time."

At the hearing, SRS contended that this provision was inconsistent with Section 402(a)(10) of the Act, which requires a State plan for AFDC to provide that assistance "shall be furnished with reasonable promptness to all eligible individuals," and violates the longstanding HEW doctrine of "equitable treatment." As stated in the briefs, HEW and its predecessor agencies have permitted State plans for public assistance to impose only those

eligibility conditions, other than those specified in the Act, which result in similar treatment of individuals similarly situated and which bear a reasonable relationship to the purposes of the program involved. As SRS indicated in its brief and in exhibits introduced at the hearing, this doctrine has been applied in the past to invalidate eligibility conditions that excluded Indians living on reservations, illegitimate children, and children living in "unsuitable" homes. This latter application of the "equitable treatment" doctrine was subsequently codified as Section 404(b) of the Act.

There is no question that the Arizona practice results in different treatment for similarly situated children, rendering

some ineligibile for AFDC benefits. The provision only becomes operative when a child is separated from an AFDC unit in which some siblings remain. Thus, if a child, both of whose parents are deceased is living with an aunt, the aunt would not need to have legal custody in order for the child to be eligible for AFDC benefits. Similarly, if an AFDC mother sends her only child to live with her sister, the aunt would apparently not have to obtain legal custody of the child to become eligible for AFDC.

On its face, the provision violates the equitable treatment doctrine in another respect. If a recipient mother sends one of her children to live with her sister, that child is ineligible for AFDC payments

unless the sister obtains legal custody. However, if the child is sent to live with a relative of the deceased father, the legal custody requirement does not apply, because the child is not living with a "relative of a natural parent who is an Aid for Dependent Children recipient." Arizona has referred to this interpretation of the provision as illogical, but never says it is incorrect, nor demonstrates that it is not actually applied in this way.

In its defense, Arizona seeks to show that the legal custody requirement is reasonably related to the purposes of the AFDC program, one of which, as stated in Section 401 of the Act, is "to help maintain and strengthen family life." Arizona

contends that its legal custody requirement serves this goal in several ways: it provides incentives for family planning, it encourages keeping the family unity intact, and it discourages families from farming out children to escape the effect of AFDC family payment maximums.

The strengthening of family life is unquestionably one of the many purposes of the AFDC program. Moreover, the legal custody requirement may in some cases serve to strangthen family life only if the "nuclear" family structure is the sole cultural pattern operative in Arizona. However, many witnesses at the hearing testified to the fact that a common, if not the predominant cultural pattern among Mexican-Americans and Indians in Arizona

is the "extended family." Under this cultural system, it is common for children to be sent to live for short periods of time with relatives. In order to receive AFDC, however, these relatives would have to undertake the burdensome and costly task of acquiring legal custody, which may invest the resulting situation with a degree of permanence that is unacceptable to everyone involved.

Another purpose of the AFDC program is to protect the welfare of children. The State's responsibility to see to it that the welfare of the child is adequately safeguarded is dealt with unequivocally in Section 405 of the Act. The legal custody requirement could very well work against this purpose of the Act. The

money that a caretaker relative has to expend in order to secure legal custody of a child could very well impair that relative's already limited ability to care for the child's needs.

Although the State argues that the requirement is needed to prevent the "farming out" of children to create additional assistance units and escape the effect of the existing maximum on AFDC payments, Arizona failed to show a single instance where this had actually occurred. Moreover, if the State wishes to prevent such situations, it should adopt some measure that focuses more directly on the problem to be prevented.

In his proposed decision, the Hearing Examiner concluded that the Government

had failed, to "sustain its burden of proof" that the Arizona legal custody requirement violated the doctrine of equitable treatment. However, he did not explain what this conclusion as to "burden of proof" meant. If this statement meant, as some of the third parties have interpreted it, that the Hearing Examiner only considered evidence introduced by counsel for the Government, then the Hearing Examiner was in error. The decision in NWRO v. Finch granted interested outside groups the status of "party" to these conformity hearings precisely so they might have an opportunity to contribute evidence to the hearing record which formed the basis for the decision of the Secretary and for judicial review of that decision. It

would frustrate the spirit of the decision in that case to allow such outside parties to introduce evidence, but then to disregard this evidence in formulating a decision.

At any rate, I find that I cannot agree with the Hearing Examiner's recommendation and, based upon my review of the entire hearing record, conclude that the Arizona "legal custody" requirement violates the doctrine of "equitable treatment" and renders the State's AFDC plan out of conformity with Section 402(a)(10) of the Act. Nothing in the Supreme Court's decision in Wyman v. James, (O.T. No. 69, Jan. 12, 1971), persuades me to find to the contrary. Although the decision in Wyman is authority for the propos-

ition that the States may have eligibility conditions for AFDC other than those specified in the Social Security Act, the Court went to great lengths to show that the particular eligibility condition involved - the home visit - was closely related to one of the fundamental purposes of the AFDC program - tending to the welfare of the dependent child. (Slip opinion, pages 9-12).

Issue No. 4 - The AFDC/CWS State-level Advisory Committee

As stated by the hearing notice, this issue concerns:

> "Whether the State plans for the AFDC and CWS programs pursuant to Title IV, Part A or Part B of the Act, with respect to an AFDC-CWS advisory committee in the administration of the service programs for families and children, are in compliance with the requirements in 45 CFR 220.4."

The regulation in question here, 45 CFR 220.4, requires that, when a State's AFDC/CWS program is administered at the State level, as Arizona's is, the State must establish an advisory committee for that program at the State level. Such committee is to advise the State agency which administers the program on matters of policy and program administration, and recipients or their representatives are to constitute at least one-third of its membership.

There has been no dispute as to the fact that Arizona is aware of this requirement and has chosen not to comply with it. Evidence introduced at the hearing demonstrated that there has been a great deal of correspondence dealing with

with this very issue between State and Federal officials.

The position taken by Arizona, both at the hearing and in its briefs and oral argument, is that the Secretary lacks the authority to issue such a regulation. At one point, the State argues that compliance with 45 CFR 220.4 would create another agency responsible for policy, rules and regulations and would thus compel the State to violate the single State agency requirement of Section 402(a)(3). This position is untenable - under the regulation, it is clear that the committee's role is purely advisory and entails none of the administrative functions which fall within the province of the single State agency which is required by Section 402(a)(3).

Nor is this regulation violative of the Tenth Amendment, as the State argues. That Amendment has never been construed as a bar to the Federal Government's requiring the States to establish councils and agencies to administer or advise on programs run by the State with Federal financial support.

The true basis of the State's objection is that the regulation exceeds the authority granted to the Secretary by Section 402(a)(5) of the Act to require State AFDC plans to provide for "such methods of administration ... as are found by the Secretary to be necessary for the proper and efficient administration of the plan ..." The State would have the word "necessary" assigned a very narrow meaning,

thus giving the Secretary a very limited authority to issue regulations pursuant to Section 402(a)(5). Under the State's interpretation, Section 402(a)(5) only grants the Secretary authority to impose those requirements without which it would be absolutely impossible for a State to administer its AFDC program. I cannot agree that the word "necessary" in Section 402(a)(5) is to be given such a narrow construction.

The purpose of the requirement of 45 CFR 220.4(a) is clear. In the past, the welfare system of this country has been subject to the criticism that it is closed and unresponsive to the needs of the very people it is designed to serve. In light of this fact, 45 CFR 220.4(a) represents

a reasonable minimum requirement designed to open up lines of communication between those who administer the AFDC program and AFDC recipients. I do not say it is the best way; or the only way, but I find that it is a reasonable minimum requirement. It is indisputable that there existed sufficient grounds for the Secretary to conclude that such an advisory committee was "necessary for the proper and efficient administration" of State AFDC plans. Section 402(a)(5) gives the Secretary broad authority and discretion to set requirements for AFDC programs. Arizona has not persuaded me that 45 CFR 220.4 is an abuse of that discretion.

For am I persuaded that the Secretary may only require the appointment of ad-

visory councils and committees in those cases where the Congress has required them by statute, as it did in Section 422(a)(1)(C)(ii) (advisory committees for day care programs) and Section 1114(a)(1). The simple answer to this objection is that if this had been the intent of Congress, there would have been no need to enact either Section 402(a)(5) or Section 1102. Accordingly, I find that Arizona has failed to comply with the requirements of 45 CFR 220.4.

At this point, I feel compelled to address myself to one objection that Arizona has raised in regard to all the Federal regulations involved herein. Arizona has consistently argued that, in issuing these regulations, the Secretary

has violated the spirit of "cooperative federalism." I think it needs to be stressed that "cooperative federalism" is not a talismanic phrase that, once invoked, permits a State to accept Federal funds under one of the public assistance titles of the Social Security Act and to expend those funds in any way it chooses.

The public assistance programs of the Social Security Act are essentially voluntary. A State need not participate at all if it chooses not to do so. But if it does so choose to participate, the State must expend the Federal money it accepts in the ways specified by Federal law. The phrase "cooperative federalism" was coined by the Supreme Court in its decision in King v. Smith, 392 U.S. 309

(1968). Yet, in that very case, the Court stated that a State's AFDC plan "must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW." (392 U.S. at 316-317). The Court then reiterated this very point in another passage:

> "There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any State law or regulation inconsistent with such federal terms and conditions is to that extent invalid." (392 U.S. 309, 333, n. 34).

For these reasons, I feel that Arizona is placing a construction on the term "cooperative federalism," which the Supreme Court never intended it to have.

Having determined, with regard to the issues raised by the July 8 hearing notice, that the Arizona plans for OAA, AFDC, AB, and APTD do not conform to the relevant requirements of Federal law, I must now determine the appropriate sanction for nonconformity. Section 404(a) of the Act, which relates to the AFDC program, provides that if, after notice and opportunity for a hearing, a State plan for AFDC is found to fail to comply with the requirements of Federal law:

> "... the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied ... that there is no longer any such failure to comply. Until he is so satisfied

> he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure.)"

The hearing sections for the OAA, AB, and APTD programs, Sections 4(a), 1004(a), and 1404(a) of the Act, contain substantially the same language.

Questions of the proper construction of those sections and of the nature of the discretion which they vest in the Secretary have been thoroughly discussed by me in the decisions issued previously in the Indiana and Nebraska conformity hearings. These sections clearly grant the Secretary the authority, if he finds a State plan under a particular title of the Act to be out of conformity with Federal requirements, to withdraw all

Federal financial support for the particular State plan involved. Moreover, these sections also vest the Secretary with discretion to apply a sanction that is less than total fund withdrawal, leaving him some degree of flexibility to tailor the remedy ordered to the violation found. The general principles that will guide me in ordering sanctions for nonconformity have been set forth in previous conformity decisions.

As regards Issue No. 1, the nonconformity lies in the fact that Arizona's automatic termination provision conflicts with the definition of residence set forth in 45 CFR 202.3. This defect in Arizona's public assistance plans potentially affects all cases in all programs. Moreover, as

the violation results in the State expending less for public assistance than it would if it fully complied with Federal requirements, it is extremely difficult to fashion a partial termination remedy that will operate as an incentive to the State to comply with the requirements of Federal law. Accordingly, I order that, as the sanction for the nonconformity found in regard to this issue, all Federal financial assistance for the OAA, AFDC, AB and APTD programs be withheld until such time as Arizona conforms to the requirements of 45 CFR 202.3.

As regards Issue No. 2, the nonconformity lies in the fact that Arizona is applying an incorrect method for computing the earned income disregard. While this defect applies only to some recipients of

Arizona's AFDC program, it potentially affects all AFDC cases. While I have been urged to continue Federal financial support for assistance payments made to those AFDC units where there is no earned income, I do not feel that these units can be considered a severable "category" or "part" under the AFDC program, within the meaning of Section 404(a) of the Act. Moreover, whereas the "services part" of the AFDC program is so closely integrated with the "assistance part" of the program, I deem it inappropriate to treat them as separate in fashioning a remedy for this particular nonconformity. Accordingly, I order that, as the sanction for this defect in the Arizona AFDC plan, all Federal financial support for Arizona's

AFDC program be withheld until such time as Arizona's AFDC plan conforms with the requirements of Section 402(a)(8)(A)(ii) of the Act, as interpreted in 45 CFR 233.20(a)(7)(i).

As indicated earlier, I have also found that the Arizona "legal custody" requirement for AFDC eligibility in certain cases, set forth in Section 3-401.3 of the Arizona APA Manual, violates the requirements of Section 402(a)(10) of the Act and the HEW doctrine of "equitable treatment." Again, this defect causes the State to spend less for AFDC assistance than full compliance would require it to do. Accordingly, I deem the appropriate sanction to be the withholding of all Federal financial support for the Arizona

AFDC program until such time as the requirements of Federal law are satisfied.

As regards Issue No. 4, the nonconformity lies in the fact that Arizona has failed to establish an AFDC/CWS Advisory Committee at the State level, as required by 45 CFR 220.4. The failure to have such a committee, whose function is to advise the single State agency on the formulation of policies and the execution of its program responsibilities, results in the State agency's carrying out its administrative and policy-making responsibilities in a way not authorized by the Secretary. Accordingly, I order, as a remedy for this violation of Federal regulations, that the Arizona Department of Public Welfare may no longer accept Federal financial

support for the expenses incurred by the central office of the State agency in its a ministration of the AFDC and CWS programs.

The sanctions which I have ordered herein are to become effective April 1, 1971. In a letter addressed to me, dated December 29, 1970, Arizona requests that I grant a stay of any decision involving withdrawal of Federal funds pending judicial review, pursuant to 5 U.S.C. 705.

Whether 5 U.S.C. 705 grants me the authority to order such a stay, which authority is not contained in the Social Security Act, is a question I need not decide. Given the fact that these issues have been known to the State for some time, that the State has shown no compel-

ling reason for granting such a stay, and that the effective date of the sanction is April 1, 1971, I have decided to deny this request of the State of Arizona.

As provided under 45 CFR 213.32(d), this decision constitutes the final decision of the Secretary on this matter.

/s/John D. Twiname
John D. Twiname
Administrator

Washington, D.C.

January 26, 1971

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE, Petitioner,	)	No. 71-1177
v.	)	JUDGMENT
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, Respondent.	)	

Upon Petition to Review an order of the Secretary of the Department of Health, Education and Welfare

This Cause came on to be heard on the Transcript of the Record from the Department of Health, Education and Welfare and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Department of Health, Education and Welfare in this

Cause be, and hereby is affirmed.

The stay order issued by this court on February 22, 1971 is vacated.

Filed and entered: September 14, 1971

A TRUE COPY

ATTEST Nov 16 1971

WM. B. LUCK, CLERK

by

R. D. Hewitt
Deputy

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE, Petitioner, v. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, Respondent.	No. 71-1177

Before: KOELSCH, BROWNING and DUNIWAY, Circuit Judges

ORDER

Tha panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

CONSTITUTION OF UNITED STATES

AMENDMENT (X.)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F

UNITED STATES CODE

TITLE 42

THE PUBLIC HEALTH AND WELFARE

§ 302(b) - Approval by Secretary

The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for assistance under the plan--

...

(2) any residence requirement which (A) in the case of applicants for old-age assistance, excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for old-age assistance and has resided

therein continuously for one year immediately preceding the application, and (B) in the case of applicants for medical assistance for the aged, excludes any individual who resides in the State; or ...

§ 601. Appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability

for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a)(3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a

single State agency to supervise the administration of the plan;...(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency--...(10) provide, effective July 1, 1951, that all individuals

wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;....

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the

parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

§ 606. Definitions

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen,

or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

§ 1202. State plans for aid to blind

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the blind under the plan--

(1) Any residence requirement which excludes any resident of the State who

has resided therein five years during the nine years immediately preceding the application for aid and has resided therein continuously for one year immediately preceding the application; or

§ 1302. Rules and regulations

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

§ 1316. Administrative and judicial review of public assistance determinations

(a)(1) Whenever a State plan is submitted to the Secretary by a State for

approval under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such subchapter. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(2) Any State dissatisfied with a determination of the Secretary under paragraph (1) with respect to any plan may, within 60 days after it has been notified of such determination, file a petition with the Secretary for reconsideration of the issue of whether such plan conforms

to the requirements for approval under such subchapter. Within 30 days after receipt of such a petition, the Secretary shall notify the State of the time and place at which a hearing will be held for the purpose of reconsidering such issue. Such hearing shall be held not less than 20 days nor more than 60 days after the date notice of such hearing is furnished to such State, unless the Secretary and such State agree in writing to holding the hearing at another time. The Secretary shall affirm, modify, or reverse his original determination within 60 days of the conclusion of the hearing.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a

final determination of the Secretary under section 304, 604, 1204, 1354, 1384, or 1396c of this title may, within 60 days after it has been notified of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determination as provided in section 2112 of Title 28.

(4) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may

modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(5) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) For the purposes of subsection (a) of this section, any amendment of a State plan approved under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of

subchapter IV of this chapter, may, at the option of the State, be treated as the submission of a new State plan.

(c) Action pursuant to an initial determination of the Secretary described in subsection (a) of this section shall not be stayed pending reconsideration, but in the event that the Secretary subsequently determines that his initial determination was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

(d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of

subchapter IV of this chapter, shall be disallowed for such participation, the State shall be entitled to and upon request shall receive a reconsideration of the disallowance.

§ 1352. State plans for aid to the permanently and totally disabled

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan--

(1) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for aid to the per-

manently and totally disabled and has resided therein continuously for one year immediately preceding the application;

FEDERAL REGULATIONS

45 C.F.R. § 202.3 (now § 233.40)
Residence.

Condition for plan approval: A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act may not impose any residence requirement which excludes any individual who is a resident of the State. For purposes of this section:

(a) A resident of a State is one who is living in the State voluntarily with the intention of making his home there and not for a temporary purpose. A child is a resident of the State in which he is living other than on a temporary basis.

Residence may not depend upon the reason for which the individual entered the State, except insofar as it may bear upon whether he is there voluntarily or for a "temporary purpose."

(b) Residence is retained until abandoned. Temporary absence from the State, or intent to return when the purposes of the absence have been accomplished, does not interrupt continuity of residence.

§ 220.4 Advisory committees.

(a) An advisory committee on AFDC and CWS programs must be established at the State level and at local levels where the programs are locally administered, except that in local jurisdictions with small caseloads alternate procedures for securing similar participation may be estab-

lished. The State plan must show that the advisory committee will:

(1) Advise the principal policy setting and administrative officials of the agency and have adequate opportunity for meaningful participation in policy development and program administration, including the furtherance of recipient participation in the program of the agency.

(2) Include representatives of other State agencies concerned with services, representatives of professional, civic or other public or private organizations, private citizens interested and experienced in service programs, and recipients of assistance or services or their representatives who shall constitute at least one-third of the membership. Such reci-

pients or their representatives must be selected in a manner that will assure the participation of the recipients in the selection process and that they are representative of recipients of assistance or services.

(3) Be provided such staff assistance from within the agency and such independent technical assistance as are needed to enable it to make effective recommendations.

(4) Be provided with financial arrangements, where necessary, to make possible the participation of recipients in the work of the committee structure.

(b) An advisory committee on day care services must be established at the State level, either as a separate committee, or all or a part of the advisory committee on

AFDC and CWS programs may be assigned this function. In either event, the committee must have at least one-third of its membership drawn from recipients or their representatives; and include representatives of agencies and groups concerned with day care or related services, i.e., other State agencies, professional or civic or other public or nonprofit private agencies, organizations or groups.

(c) The State plan must also show the structure and functions of the State and local committees for AFDC and CWS programs and for day care services; their relationship to other boards and committees associated with the State and local agencies; the system for selecting recipients or their representatives; and assure that the

State committee for AFDC and CWS programs will be established no later than 90 days after plan approval.

§ 233.20 Need and amount of assistance.

(a) Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

(1) General. Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except where otherwise specifically authorized by Federal statute.

(2) Standards of assistance. (i) Specify a statewide standard, expressed in money amounts, to be used in determining

(a) the need of applicants and recipients and (b) the amount of the assistance payment.

(ii) In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with

subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards.

(iii) Provide that the standard will be uniformly applied throughout the State.

(iv) Include the method used in determining needs, which must be one of the three methods described in "Guides and Recommendations" or a comparable method which meets the conditions specified in such guides and is approved by the Assistance Payments Administration.

(v) If the State agency includes special need items in its standard, (a) describe those that will be recognized, and the circumstances under which they will

be included, and (b) provide that they will be considered in the need determination for all applicants and recipients requiring them.

(vi) If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals, (a) specify the persons whose needs will be included in the individual's need, and (b) provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.

(3) Income and resources; OAA, AFDC, AB, APTD, AABD. (i) Specify the amount and types of real and personal property, including liquid assets, that may be reserved, i.e., retained to meet the current and future needs while assistance is re-

ceived on a continuing basis. In addition to the home, personal effects, automobile and income producing property allowed by the agency, the amount of real and personal property, including liquid assets, that can be reserved for each individual recipient shall not be in excess of two thousand dollars. Policies may allow reasonable proportions of income from businesses or farms to be used to increase capital assets, so that income may be increased.

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (a) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied,

will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs; (b) if agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their needs as determined by the statewide standard; (c) Only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; (d) current payments of assistance will not be reduced because of prior overpayments unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment.

except that where there is evidence which clearly establishes that a recipient willfully withheld information about his income or resources, such income or resources may be considered in the determination of need to reduce the amount of the assistance payment in current or future periods; and (e) income and resources will be reasonably evaluated.

(iii) Provide that no inquiry will be made of the amount of earnings of a child under 14 years of age.

(iv) Provide that, in determining the availability of income and resources, the following will not be included as income: (a) Income equal to expenses reasonably attributable to the earning of income; (b) loans and grants, such as scholarships,

obtained and used under conditions that preclude their use for current living costs; and (c) home produce of an applicant or recipient, utilized by him and his household for their own consumption.

(v) Provide that agency policies assure that when support payments by absent parents have been ordered by a court, a regular amount of income is available monthly to meet the determined needs of the mother and children, whether or not the support payments are received regularly, and the agency does not delay or reduce public assistance payments on the basis of assumed support which is not actually available.

(vi) If the State agency holds relatives responsible for the support of applicants

and recipients, (a) include an income scale for use in determining whether responsible relatives have sufficient income to warrant expectation that they can contribute to the support of applicants or recipients, which income scale exceeds a minimum level of living and at least represents a minimum level of adequacy that takes account of the needs and other obligations of the relatives; and (b) provide that no request will be made for contributions from relatives whose net cash income is below the income scale. In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21.

(vii) If the State agency establishes

policy under which assistance from other agencies and organizations will not be deducted in determining the amount of assistance to be paid, provide that no duplication shall exist between such other assistance and that provided by the public assistance agency. In such complementary program relationships, nonduplication shall be assured by provision that such aid will be considered in relation to: (a) The different purpose for which the other agency grants aid, such as vocational rehabilitation; (b) the provision of goods and services that are not included in the statewide standard of the public assistance agency, e.g., a private agency might provide money for special training for a child or for medical care when the public assistance

agency does not carry this responsibility; or housing and urban development relocation adjustment payments for items not included in assistance standards; or (c) the fact that public assistance funds are insufficient to meet the total amount of money determined to be needed in accordance with the statewide standard. In such instances, grants by other agencies in an amount sufficient to make it possible for the individual to have the amount of money determined to be needed, in accordance with the public assistance agency standard, will not constitute duplication.

(viii) Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums

or insufficient funds, adjustments will be made by methods applied uniformly statewide.

(ix) Provide that the agency will establish and carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability.

(4) Disregard of income common to OAA, AFDC, AB, APTD, or AABD. (i) If the State chooses to disregard income from all sources before applying other provisions for disregarding or setting aside income, specify the amount that is first to be disregarded, but not more than $7.50 ($5 in AFDC) per month, of any income of an individual, child or relative claiming assistance. All income must be included such as social security or other

benefits, earnings, contributions from relatives, or other income the individual may have.

(ii) Provide that, in determining need and the amount of the assistance payment, the following will be disregarded: (a) The value of the coupon allotment under the Food Stamp Act of 1964 in excess of the amount paid for the coupons; (b) the value of the U. S. Department of Agriculture donated foods (surplus commodities); and (c) any highway relocation assistance paid under the Federal-Aid Highway Act of 1968.

(iii) Provide that income and resources which are disregarded or set aside under this part will not be taken into consideration in determining the need of any other individual for assistance.

(5) Disregard of income applicable to OAA, AB, APTD, or AABD. Provide that, in determining need and amount of assistance, (i) with respect to payments made to or on behalf of an individual or to or on behalf of another person, for any month under title I or II of the Economic Opportunity Act of 1964 or under any program asisted(sic) under such title, (a) the first $85 plus one-half of the excess over $85 will be disregarded and (b) any excess over such amount will be taken into consideration in determining the need of any other individual for assistance only to the extent they are made available to or for such other individual (effective July 1, 1969, not applicable; for this purpose payments under title I or II of the Economic Opportunity Act are

described in CA Memo 23-A, dated August 26, 1966, issued by the Office of Economic Opportunity); and (ii) training incentive payments and expense allowances made to an individual or to any other person under the Manpower Development and Training Act of 1962, as amended, will be disregarded.

(6) Disregard of earned income; definition. Provide that for purposes of disregarding earned income the agency policies will include: (i) A definition of "earned income" in accordance with the provisions of subdivisions (iii) through (viii) of this subparagraph; and

(ii) Provision for disregarding earned income for the period during which it is earned, rather than when it is paid, in cases of lump-sum payment for services rendered over a period of more than 1 month.

(iii) The term "earned income" encom-

passes income in cash or in kind earned by a needy individual through the receipt of wages, salary, commissions, or profit from activities in which he is engaged as a self-employed individual or as an employee. Such earned income may be derived from his own employment, such as a business enterprise, or farming; or derived from wages or salary received as an employee. It includes earnings over a period of time for which settlement is made at one given time, as in the instance of sale of farm crops, livestock, or poultry. In considering income from farm operation, the option available for reporting under OASDI, namely the "cash receipts and disbursements" method, i.e., a record of actual gross, of expenses, and of net, is an individual

determination and is acceptable also for public assistance.

(iv) With reference to commissions, wages, or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

(v) With respect to self-employment, the term "earned income" means the total profit from business enterprise, farming, etc., resulting from a comparison of the gross income received with the "business expenses," i.e., total cost of the produc-

tion of the income. Personal expenses, such as income-tax payments, lunches, and transportation to and from work, are not classified as business expenses.

(vi) The definition shall exclude the following from "earned income": Returns from capital investment with respect to which the individual is not himself actively engaged, as in a business (for example, under most circumstances, dividends and interest would be excluded from "earned income"); benefits (not in the nature of wages, salary, or profit) accruing as compensation, or reward for service, or as compensation for lack of employment (for example, pensions and benefits, such as United Mine Workers' benefits or veterans' benefits).

(vii) With regard to the degree of activity, earned income is income produced as a result of the performance of services by a recipient; in other words, income which the individual earns by his own efforts, including managerial responsibilities, would be properly classified as earned income, such as management of capital investment in real estate. Conversely, for example, in the instance of capital investment wherein the individual carries no specific responsibility, such as where rental properties are in the hands of rental agencies and the check is forwarded to the recipient, the income would not be classified as earned income.

(viii) Reserves accumulated from earnings are given no different treatment than

reserves accumulated from any other sources.

(7) Disregard of earned income; method.

(i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income," and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment.

(ii) In applying the disregard of income under subparagraph (11)(ii)(b) of this paragraph to an applicant for AFDC, there will be a preliminary step to determine whether there is eligibility without the application of any AFDC provisions for

the disregard or setting aside of income. If such elegibility exists, the next step is to determine need and the amount of assistance by disregarding income and deducting work expenses in accordance with the method described in subdivision (i) of this subparagraph.

(8) Disregard of earned income applicable only to OAA, APTD, or AABD.

If the State chooses to disregard earned income, specify the amount to be disregarded of the first $80 per month of income that is earned by an aged or disabled individual claiming OAA, APTD, or AABD, who is not blind, but not more than $20 per month plus one-half of the next $60 of such earned income.

(9) Disregard of income and resources applicable only to APTD or AABD.

If the State chooses to disregard income (which may be additional to the income disregarded under subparagraph (8) of this paragraph) or resources for a disabled individual to achieve the fulfillment of a plan of self-support, provide that the amounts of additional income and resources will not exceed those found necessary for the period during which the individual is actually undergoing vocational rehabilitation, and specify the period, not in excess of 36 months, for which such amounts are to be disregarded.

(10) Disregard of income and resources applicable only to AB or AABD.

Provide that, in determining the need of individuals who are blind, (i) the first $85 per month of earned income of the individual plus one-half of earned income

in excess of $85 per month will be disregarded; and (ii) if the individual has a plan for achieving self-support, such additional income and resources as are necessary to fulfill such plan will be disregarded for a period not in excess of 12 months. Such additional income and resources may be disregarded for an additional period not in excess of 24 months (for a total of 36 months), as specified in the State plan.

(11) Disregard of income applicable only to AFDC. (i) Effective until the State plan includes the provision in sub-division (ii)(b) of this subparagraph, not later than July 1, 1969, if the State chooses to disregard earned income of dependent children under age 18, specify the amount that is to be disregarded, but not more than $50 per month of income

which is earned by any such child and not more than a total of $150 per month of earned income of all such dependent children living together in the same home.

(ii) Effective July 1, 1969, provide for the disregard of earned income as shown in (a) and (b) of this subdivision. Prior to July 1, 1969, States may elect to disregard earned income in accordance with the provisions as stated in such (a) or (b) of this subdivision, or both, or neither; (a) All of the earned income of any child receiving AFDC if the child is a full-time student or is a part-time student who is not a full-time employee. A student is one who is attending a school, college or university or a course of vocational or technical training designed to

fit him for gainful employment and includes a participant in the Job Corps program under the Economic Opportunity Act of 1964. A full-time student must have a school schedule that is equal to at least one-half of a full-time curriculum; (b) the first $30 of the total of earned income for a month of all other individuals whose needs are included in the family grant, plus one-third of the remainder of their earned income for the month; except that (1) the State agency will not disregard earned income for a month of any one of the persons in a family as provided in (b) of this subdivision if such a person (i) terminated his employment or reduced his earned income without good cause within the period of

30 days preceding such month; or (ii) refused without good cause within the period of 30 days preceding such month to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; and (2) the State agency will not disregard earned income for a month of the persons in a family as provided in (b) of this subdivision if the total income of such persons for such month exceeds their need as determined without application of any provisions for disregarding or setting

aside of income unless for any one of the four preceding months their needs were met in whole or in part by an AFDC payment.

(iii) If any portion of AFDC family's income is to be conserved for the future identifiable needs of a child, specify the needs and amount and type of income to be conserved and provide that such amount will be reasonable for the purpose for which it is being conserved.

(iv) Earned income for purposes of this subparagraph (11) includes training incentive payments and work allowances under the MDTA, payments under the Economic Opportunity Act of 1964, including payments to beneficiaries of assistance under that act, or earnings under title I of the Elementary and Secondary Education Act,

but does not include incentive payments or earnings derivod from participation in Institutional and Work Experience Training or Special Work Projects under the Work Incentive Programs established under part C of title IV of the Social Security Act.

(b) Federal financial participation; General. (1) Federal participation will be available in financial assistance payments made on the basis that (after application of policies governing the allowable reserve, disregard or setting aside of income and resources), all income of the needy individual, together with the assistance payment, do not exceed the State's defined standard of assistance, and availbale(sic) resources of the needy individuals do not exceed the limits under the State plan.

(2) Federal participation is available within the maximums specified in the Federal law, when the payments do not exceed the amount determined to be needed under the statewide standard, and are made in accordance with the State method for determining the amount of the payment.

(3) Federal participation is available in financial assistance payments made on the basis of the need of the individual. This basis may include consideration of needy persons living in the same home with the recipient when such other persons are within the State's policy as essential to his well-being. Persons living in the home who are "essential to the well-being of the recipient," as specified in the State plan, will govern as the basis for

Federal participation (see Guides and Recommendations). When the State includes persons living outside the home or persons not in need, Federal participation is not available for that portion of financial assistance payments attributable to such persons, and the State's claims must, therefore, identify the amounts of any such nonmatchable payments.

(4) The amount of the payments by the agency to the recipient representing support payments received by the agency is not subject to Federal financial participation. The normal procedure followed under these circumstances is to pay the gross needs amount and claim this amount for Federal financial participation and then handle the support payment as a

refund and adjust the Federal share on this basis.

(c) Federal financial participation in vendor payments for home repairs. With respect to expenditures made after December 31, 1967, expenditures to a maximum of $500 are subject to Federal financial participation at 50 percent for repairing the home owned by an individual who is receiving aid or assistance (other than Medical Assistance for the Aged) under a State plan for OAA, AFDC, AB, APTD, or AABD if:

(1) Prior to making the expenditures the agency determined that: (i) The home is so defective that continued occupancy is unwarranted; (ii) unless repairs are made the recipient would need to move to rental quarters; and (iii) the rental cost

of quarters for the recipient (including the spouse living with him is such home and any other individual whose needs were considered in determining the recipient's need) would exceed (over a period of 2 years) the repair costs needed to make such home habitable together with other costs attributable to continued occupancy of such home.

(2) No expenditures for repair of such home were made previously pursuant to a determination as described in subparagraph (1) of the paragraph. This does not preclude more than one payment made at the time repairs are made pursuant to the determination, e.g., separate payments to the roofer, the electrician, and the plumber.

(3) Expenditures for home repairs are authorized in writing by a responsible agency person, records show the eligible person in whose behalf the home repair expenditure was made, and there is sufficient evidence that the home repair was performed.

STATE STATUTES

A.R.S. § 46-209

Residence in state after assistance granted; basis for discontinuance of payments to recipients of general assistance, aid to permanently and totally disabled, aid to dependent children, assistance to needy blind, or old age assistance

A. Any recipient of assistance desiring to reside outside the state for a period not to exceed ninety days shall execute a form provided by the state department. The form shall require the recipient to express his intent as to establish-

ing legal residence outside the state, or his intent to return to the state within ninety days. If it is the intent of recipient to establish legal residence outside the state, he may continue to receive assistance from this state while residing in another state for a period not to exceed three months or until he meets the residence eligibility requirements for assistance in that state, whichever is lesser.

B. A recipient of any assistance granted under this title shall not be continued on assistance after he has been absent from the state for three consecutive months.

STATE ADMINISTRATIVE REGULATIONS

Assistance Payments Manual § 3-303.2:

"Assistance Payments Out of State: Recipients who leave the State with the intention of returning will file a statement of Intention of Residence, DPW-317, at the County Welfare Department prior to leaving the State in order to establish continued eligibility during their absence, or for a maximum period of 90 days.

"Recipients who leave the State of Arizona with the intention of establishing residence elsewhere will also complete the form DPW-317: The recipient will be advised that assistance from the State of Arizona will be continued only until his eligibility for assistance can be established in the other state and he must make application there immediately after arrival. The County Worker will also write

to the County Welfare Office nearest the place of the recipient's new residence informing them of his presence in that state, his intent to establish residence, and that the State of Arizona will discontinue assistance immediately after approval of the application of at the end of 90 days, whichever date comes first."

Assistance Payments Manual, Instructions accompanying form DPW-324:

"The State plan for AFDC provides that the earnings exemption of $30 per month plus one-third of the remainder must be applied to net earnings, that is gross earnings minus the cost of employment allowances. This method is set forth in item 2.B.3 of the Instructions accompanying form DPW-324, as follows:

"(11) Enter the Gross Earnings from

Employment of all adult recipients; and of any child recipient whose earnings are not totally disregarded.

"(12) Enter the cost of employment allowance(s). (See 3-1120-5D).

"(13) Subtract line (12) from line (11) and enter difference.

"(14) Enter amount of earnings disregarded by law or policy (i.e. ADC: '$30 + 1/3;' AB '$85 + 1/2').

"(15) Subtract line (14) from line (13) and enter difference.

NOTE: In lines (16) and (17), DO NOT INCLUDE amounts set aside for the future identifiable needs of ADC Children. Note the

amount and purpose of the "set aside" in the case record."

Assistance Payments Manual § 3-401.3

"Grantee-Relatives: The relatives other than parents with whom a dependent child may live and who may receive a grant for the care of said child, are his grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece. In determining the existence of the relationship, the words "grandfather," "grandmother," "aunt" and "uncle" include the relationships denoted by grand, great, and great-great. "brother," "sister," "uncle" and "aunt" include those of half-blood or adoptive relationship.

"Spouses of any of the above named rela-

tives are also of proper relationship. However, after the death of a relative by consanguinity the relationship of the spouse or such relative to the dependent child by affinity ceases to exist.

"A relative of a natural parent who is an Aid for Dependent Children recipient cannot be approved for an Aid for Dependent Children grant on behalf of any of the children of said parent unless said relative or the Department of Public Welfare has legal custody of the child or children named in the application. The custody order will be waived in cases where due to the illness of the parent it is the medical recommendation that responsibility for all of the children not be undertaken by the parent for a given period of time."

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-707

ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL AND REHABILITATION SERVICE, JOHN D. TWINAME, Administrator,

Respondents,

D.N.A., INC., WELFARE CLIENTS; NATIONAL WELFARE RIGHTS ORGANIZATION AND ITS ARIZONA AFFILIATES: MARICOPA COUNTY LEGAL AID SOCIETY CLIENTS,

Intervenors/Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERRY LEVINE
Maricopa County Legal
Aid Society
P. O. Box 3076
Tempe, Arizona 85281

Attorney for Intervenors/
Respondents

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42 U.S.C. §602 4, 11
(This provision is reproduced at p. F 3-5 of Petitioner's Petition for Writ of Certiorari.)

42 U.S.C. §1316 11
(This provision is reproduced as Appendix A of this brief).

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69 Supt. Ct. 7

S. Rep. No. 711, 75th Cong., 1st Sess. 6

STATEMENT OF THE CASE

We adopt Petitioner's statement of the case at p. 5-15 of its Petition for a Writ of Certiorari except for the paragraph on p. 14-15.

ARGUMENT

Rule 19, Supreme Court Rules, governs decisions concerning petitions for certiorari. The Rule states that review on such writs is a discretionary matter--not of right. As this Court stated in Fay v. Noia, 372 U.S. 391, 436 (1963), "Review on certiorari . . . does not provide a normal appellate channel in any sense comparable to the writ of error." The Rule specifically states that such review "will be granted only where there are special and important reasons therefor." It then goes on to indicate the types of reasons which will be considered. The only ones that could be applicable to this case are: (1) where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the

same matter; or (2) has decided an important question of federal law which has not been, but should be, settled by this court; or (3) has decided a federal question in a way in conflict with applicable decisions of this court.

None of these reasons exist in this case.

(1) There are no conflicting Court of Appeals decisions on the same matter.

Concerning the original four conformity issues, which are stated at p. 9-12 of the Petition for Writ of Certiorari submitted by the Arizona State Department of Public Welfare [hereinafter referred to as "Pet. for Cert."], the welfare department's position on issues 1, 2, and 4 is that the relevant HEW regulations are invalid--not that the state regulations are in compliance

with them. Pet. for Cert. at 18-19, 21, 27-29, 31-32. In the proceeding below the Ninth Circuit Court of Appeals held that all the HEW regulations were valid. Pet. for Cert. at appendix A13-15, A17-19, A21-23. The court did not indicate any contradictory Court of Appeals decisions. And in its Petition for Certiorari the welfare department has not cited any Court of Appeals decisions even generally in support of its assertion that the applicable HEW regulations are invalid--let alone a decision that struck them down.

The welfare department's position on the third original issue (listed at p. 11 of Pet. for Cert.) is that its regulation is consistent with 42 U.S.C. §602(a)(10). Pet. for Cert. at 23. The Ninth Circuit

held otherwise. Pet. for Cert. at A29-31. Again, neither it nor the welfare department in its Petition for Certiorari cite any conflicting Court of Appeals decision.

Thus, there is no necessity for this Court to grant the writ in order to secure uniformity of decision. There is not a single Court of Appeals decision contrary to that of the Ninth Circuit Court of Appeals below on any of the issues in this case.

(2) No important question of federal law was decided by the court below which has not been, but should be, settled by this Court.

In deciding whether or not a case is one that should be reviewed under certiorari this Court considers whether or not it presents new and plausible federal questions on which law needs to be made. Madden,

One Supreme Court and the Writ of Certiorari, 15 Hastings L. J. 153, 159-60 (1963). As Chief Justice Hughes pointed out, review by certiorari is "in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants." S. Rep. No. 711, 75th Cong., 1st Sess., p. 39.

Thus, the fact that the decision sought to be reviewed is wrong does not mean that the Supreme Court will take it for review. 15 Hastings L. J. supra at 159. Chief Justice Vinson stated:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case . . . A petition for certiorari should explain why it is vital that the question involved be decided finally by

> the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose.

69 Sup. Ct. V, VI-VII (1949). Similarly Justice Harlan has stated that "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari." Harlan, Manning the Dikes, 13 Record of the Ass'n of the Bar of the City of New York 541, 551 (1958).

In its Petition for Certiorari Arizona has attempted only to show that the decision by the Secretary of HEW and the Ninth Circuit Court of Apppeals were in error. Arizona has not indicated any novel federal questions involved in its attack on HEW's rule-making power nor any other reasons why it is vital that this Court grant its Petition for

Certiorari.

Even Arizona's attempt to demonstrate error in the decisions below is without merit. Concerning its 90-day termination policy for recipients who move out of the state Arizona contends that the HEW regulation with which it fails to conform is "a definition of residency not contemplated by Congress", and therefore beyond HEW's rule-making authority. Pet. for Cert. at 19. However, as the Court of Appeals stated below:

> [W]e cannot find the Secretary's definition inconsistent with the letter or the spirit of the [Social Security] Act merely because it holds the states to a higher standard.

Pet. for Cert. at appendix A14.

Similarly, this Court has upheld a HEW regulation which defined the terms "income and resources" contained in the Act so as

to place more stringent requirements on state AFDC programs. Lewis v. Martin, 397 U.S. 552 (1970). Moreover, Arizona has failed to state the "compelling indications" that HEW's construction of the statute is wrong which is required to strike down the construction of a statute by the agency charged with its execution. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

Concerning the AFDC income-disregard issue, Pet. for Cert. at 10, Arizona's position is that the HEW regulation requiring the income disregard to be applied to gross income is in violation of King v. Smith, 392 U.S. 309 (1968) and Dandridge v. Williams, 397 U.S. 471 (1970) evidently because it allegedly interferes with the

State's latitude in dispensing funds. See Pet. for Cert. at 21, A18.

The Ninth Circuit Court of Appeals found, however, that the HEW rule does not interfere in this way. See Pet. for Cert. at appendix A19. Furthermore, the State's power in dispensing funds is certainly limited by valid federal requirements and Arizona has failed to indicate any respect in which the HEW requirement is otherwise invalid.

Concerning its requirement that the caretaker-relative or the welfare department must have legal custody of a child whose siblings are also receiving AFDC in the home of their natural parents in order for such child to be eligible for AFDC, Arizona contends merely that the decisions of the Secretary and of the Court of Appeals were

incorrect in finding that this requirement failed to conform to 42 U.S.C. §602(a)(10). Pet. for Cert. at 23-26.

This is insufficient reason for granting Arizona's petition. This Court has always given deference to HEW's interpretation of the Social Security Act. See, e.g., Rosado v. Wyman, 397 U.S. 397, 415 (1970) and Lewis v. Martin, 397 U.S. 552, 559 (1970). Furthermore, there is no reason for this Court to review the Court of Appeals decision upholding HEW's conclusion that the State failed to conform. Under 42 U.S.C. §1316 Congress has vested the Courts of Appeals with responsibility for reviewing such conformity determinations. They are to be upheld if they are supported by substantial evidence. 42 U.S.C. §1316(a)(4). See Appendix A. This Court has stated that in

situations where "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility" for reviewing agency findings on the basis of substantial evidence "decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality" should be left undisturbed. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 502 (1950).

Concerning the HEW requirement that the State establish a state-wide advisory council composed of 1/3 welfare recipients or their representatives Arizona argues that the regulation adds another advisory council requirement not intended by Congress, and that it is not "necessary for the proper and efficient operation of the Social Security

Act." Pet. for Cert. at 29-32.

As to Arizona's argument that HEW has added a requirement not intended by Congress, the Court of Appeals stated that the "beneficient purposes of the Social Security Act would be stultified by rigidly attributing to each Congressional attempt to improve the Act's responsiveness a concomitant Congressional intent not to permit further administrative improvements by those charged with the Act's implementation." Pet. for Cert. at appendix A22.

Moreover, the Court upheld the Secretary's finding that the regulation was "necessary for the proper and efficient administration of the [state's] plan" on the basis of the substantial evidence standard set out in the relevant statute. Pet. for Cert. at appendix

A23. There is no reason, therefore, as explained above, for this Court to disturb this decision since it was based on a fair assessment of the record. NLRB v. Pittsburgh Steamship Co., supra.

(3) The Court of Appeals decision does not conflict with any applicable decisions of this Court.

Concerning the AFDC income-disregard issue, Pet. for Cert. at 10, Arizona does not contend that its method of subtracting the income disregard from net income is consistent with the HEW regulation requiring that the income disregard be applied to gross income. Instead, Arizona argues that the HEW regulation is in violation of King v. Smith, 392 U.S. 309 (1968) and Dandridge v. Williams, 397 U.S. 471 (1970). Pet. for Cert. at 21. Arizona does not specify the way in which it believes the HEW regulation to conflict with these cases. However,

in the Ninth Circuit Court of Appeals Arizona contended that the federal regulation infringes on the state's power to set the level of benefits relying on King and Dandridge, supra. Pet. for Cert. at appendix A18.

Arizona makes a similar argument with regard to HEW's requirement that it set up an advisory council, contending that the requirement "violates the spirit of cooperative federalism". Arizona cites King v. Smith, supra, in reliance. Pet. for Cert. at 27-28.

In upholding the applicable federal regulations the Court of Appeals decision is not inconsistent with these cases. Even if HEW is interfering with the State's power to set the level of benefits, it may do so if the requirement it imposes is valid.

> There is of course no question that the Federal Government, unless

> barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.

King v. Smith, supra, at 333 n. 34.

Concerning Arizona's contention that the HEW advisory council requirement violates the spirit of cooperative federalism, King v. Smith, supra, is on point.

> The AFDC program is based on scheme of cooperative federalism. . . . States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of [HEW]. . . . The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW.

Id. at 316-17. (Emphasis added).

Thus, the Court of Appeals decision upholding HEW's income disregard and advisory council regulations does not conflict with King v. Smith and Dandridge v. Williams.

CONCLUSION

Arizona's Petition for a Writ of Certiorari must be denied. There are no conflicting Court of Appeals decision concerning the issues it raises. The Ninth Circuit Court of Appeals, in upholding HEW's finding of non-conformity on all four issues, decided no federal questions which should require the scrutiny of this Court. Furthermore the decision was consistent with applicable decisions of this Court.

RESPECTFULLY SUBMITTED this 28th day of December, 1971.

Jerry Levine

JERRY LEVINE
Maricopa County Legal Aid Soc.
P. O. Box 3076
Tempe, Arizona 85281
Attorney for Intervenors/
Respondents

fiscal year beginning after June 30, 1967, shall be available, under such terms and conditions as the Secretary may establish, for payments to States to cover so much of the cost of such projects as is not covered by payments under such subchapters and is not included as part of the cost of projects for purposes of section 1310 of this title.

Aug. 14, 1935, c. 531, Title XI, § 1115, as added July 25, 1962, Pub.L. 87-543, Title I, § 122, 76 Stat. 192, and amended July 30, 1965, Pub. L. 89-97, Title I, § 121(c) (3), 79 Stat. 352; June 29, 1967, Pub.L. 90-36, § 2, 81 Stat. 94; Jan. 2, 1968, Pub.L. 90-248, Title II, §§ 241(c) (4), 247, 81 Stat. 917, 918.

Historical Note

1968 Amendment. Pub.L. 90-248, § 241(c) (4), in the opening phrase deleted "IV," following "I," and inserted ", or part A of subchapter IV of this chapter," after "XIX of this chapter".

Pub.L. 90-248, § 247, substituted in second sentence "$4,000,000" for "$2,000,000" and "beginning after June 30, 1967" for "ending prior to July 1, 1968".

1967 Amendment. Pub.L. 90-36 substituted "July 1, 1968" for "July 1, 1967".

1965 Amendment. Pub.L. 89-97 included in the enumeration in the opening phrase, and clauses (a) and (b), subchapter XIX of this chapter, and sections 1396a and 1396b of this title, respectively.

Effective Date of 1965 Amendment. Section 121(c) (3) of Pub.L. 89-97 provided in part that the amendment of this section by Pub.L. 89-97 shall be effective Jan. 1, 1966.

Legislative History. For legislative history and purpose of Pub.L. 87-543, see 1962 U.S.Code Cong. and Adm.News, p. 1943. See, also, Pub.L. 89-97, 1965 U.S. Code Cong. and Adm.News, p. 1943; Pub.L. 90-36, 1967 U.S. Code Cong. and Adm.News, p. 1289; Pub.L. 90-248, 1967 U.S.Code Cong. and Adm.News, p. 2834.

Library References

United States ⇐82. C.J.S. United States § 182.

§ 1316. Administrative and judicial review of public assistance determinations

(a) (1) Whenever a State plan is submitted to the Secretary by a State for approval under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such subchapter. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(2) Any State dissatisfied with a determination of the Secretary under paragraph (1) with respect to any plan may, within 60 days after it has been notified of such determination, file a petition with the Secretary for reconsideration of the issue of whether such plan conforms to the requirements for approval under such subchapter.

Within 30 days after receipt of such a petition, the Secretary shall notify the State of the time and place at which a hearing will be held for the purpose of reconsidering such issue. Such hearing shall be held not less than 20 days nor more than 60 days after the date notice of such hearing is furnished to such State, unless the Secretary and such State agree in writing to holding the hearing at another time. The Secretary shall affirm, modify, or reverse his original determination within 60 days of the conclusion of the hearing.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary under section 304, 604, 1204, 1354, 1384, or 1396c of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determination as provided in section 2112 of Title 28.

(4) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(5) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) For the purposes of subsection (a) of this section, any amendment of a State plan approved under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, may, at the option of the State, be treated as the submission of a new State plan.

(c) Action pursuant to an initial determination of the Secretary described in subsection (a) of this section shall not be stayed pending reconsideration, but in the event that the Secretary subsequently determines that his initial determination was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

(d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, shall be disallowed for such par-

ticipation, the State shall be entitled to, and upon request shall receive a reconsideration of the disallowance.

Aug. 14, 1935, c. 531, Title XI, § 1116, as added July 30, 1965, Pub.L. 89-97, Title IV, § 404(a), 79 Stat. 419, and amended Jan. 2, 1968, Pub. L. 90-248, Title II, § 241(c) (5), 81 Stat. 917.

Historical Note

1968 Amendment. Subsec. (a) (1). Pub.L. 90-248, § 241(c) (5) (A), deleted "IV," following "I," and inserted "or part A of subchapter IV of this chapter," after "XIX of this chapter,".

Subsecs. (b), (d). Pub.L. 90-248, § 241(c) (5) (B), deleted "IV," following "I," and inserted ", or part A of subchapter IV of this chapter," after "XIX of this chapter".

Effective Date. Section 404(b) of Pub. L. 89-97 provided that: "The amendment made by subsection (a) [adding this section] shall apply only with respect to determinations made after December 31, 1965."

Legislative History. For legislative history and purpose of Pub.L. 89-97, see 1965 U.S.Code Cong. and Adm.News, p. 1943. See, also, Pub.L. 90-248, 1967 U.S. Code Cong. and Adm.News, p. 2834.

Notes of Decisions

Construction with other laws 1
Parties 2
Review 3

1. Construction with other laws

Reference in section 2000d-2 of this title to judicial review as may otherwise be provided by law is not limited to the judicial review already in existence when said section was enacted, and does not preclude judicial review in accordance with this section declaring that any state dissatisfied with final determination of Secretary may file petition for review with Court of Appeals. Gardner v. State of Ala. for and in Behalf of Dept. of Pensions and Sec., C.A.Ala.1967, 385 F.2d 804, certiorari denied 88 S.Ct. 773, 389 U.S. 1046, 19 L.Ed.2d 839.

Notwithstanding absence of specific statutory provision for review of order terminating federal funds for child welfare service program under this chapter, in view of this section and section 2000d-2 of this title giving Court of Appeals exclusive jurisdiction of review of order terminating federal funds for the other four social security welfare programs because of alleged racial discrimination in administration of programs, consideration of the several programs and sensible judicial administration required construction of said sections to give Court of Appeals jurisdiction to review order terminating all five programs. Id.

2. Parties

Action of State in joining four individuals as parties plaintiff in suit filed in district court challenging validity of order of Secretary terminating payment of approximately $100,000,000 in federal funds to state agency disbursing welfare did not defeat sole and exclusive jurisdiction of Court of Appeals granted by this section over actions brought by State to review order terminating federal funds to state agency. Gardner v. State of Ala. for and in Behalf of Dept. of Pensions and Sec., C.A.Ala.1967, 385 F.2d 804, certiorari denied 88 S.Ct. 773, 389 U.S. 1046, 19 L.Ed.2d 839.

3. Review

In view of provision of this section for judicial review of agency action in the Court of Appeals and section 2000d-2 of this title stating that order terminating federal funds was reviewable in same manner as review of order for termination of funds under other sections of this chapter, Court of Appeals had sole and exclusive jurisdiction to review order of Secretary terminating federal welfare funds for State because of its failure to comply with regulations prohibiting discrimination in welfare programs financed by funds given under this chapter. Gardner v. State of Ala. for and in Behalf of Dept. of Pensions and Sec., C.A. Ala.1967, 385 F.2d 804, certiorari denied 88 S.Ct. 773, 389 U.S. 1046, 19 L.Ed.2d 839.

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No. 71-707

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE,
PETITIONER

v.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICE, JOHN D. TWINAME, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Pursuant to the Social Security Act, 42 U.S.C. 301, *et seq.*, the federal government provides grants-in-aid to states which administer programs for supplying assistance to specified categories of needy individuals and families. States choosing to receive these grants-in-aid are required to formulate plans for administering the assistance programs (Pet. App. A2). While the Act gives the states broad discretion in designing many aspects of the plans, it prescribes certain requirements

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with which a state's plan must comply in order to be eligible for grants-in-aid (Pet. App. A2).

Before the Secretary of Health, Education, and Welfare, acting through the Administrator of Social and Rehabilitation Service, can approve any such plan, he must determine that it conforms to those federal requirements. If the Secretary questions a state plan's conformity to federal requirements, he must provide reasonable notice and opportunity for hearing to the state agency administering the plan (Pet. App. A3). Following a conformity hearing, if the Secretary determines that the plan does not meet federal requirements, he must terminate federal payments to the state program until the non-compliance is cured (Pet. App. A3). The state is entitled to judicial review, in a United States Court of Appeals, of the Secretary's order of termination. 42 U.S.C. 1316.

In the instant case, the Administrator determined, after a conformity hearing, that four of the assistance programs administered by the Arizona state agency[1] were out of conformity with federal requirements in four respects. First, the Administrator found Arizona's conclusive presumption of termination of residency after a 90-day absence (Arizona Rev. Stat. § 46–209) to be inconsistent with the HEW regulation defining residency as continuing as long as there is an intent to return (34 Fed. Reg. 8715 (1969)). Second, the

[1] The four programs involved were old age assistance (42 U.S.C. 301, *et seq.*); aid to families with dependent children and child-welfare services (42 U.S.C. 601, *et seq.*); aid to the blind (42 U.S.C. 1201, *et seq.*); and aid to the permanently and totally disabled (42 U.S.C. 1351, *et seq.*).

Administrator found that Arizona's method of excluding income required to be disregarded in calculating need in its program for granting aid to families with dependent children (AFDC) (deducting excluded income from *net* income after expenses) was inconsistent with HEW's regulation requiring such excluded income to be deducted from *gross* income (45 C.F.R. 233.20(a)(7)). Third, the Administrator concluded that Arizona's requirement of legal custody, before a relative (other than the child's natural parent) could receive assistance under AFDC, created a discriminatory classification and was incompatible with the purposes of AFDC.[2] Finally, the Administrator found that Arizona had failed to organize advisory committees involving the needy as required by regulation (45 C.F.R. 220.4).

Accordingly, the Secretary terminated federal payments to the state programs pending state compliance with federal law (Pet. App. B2–B71). The Court of Appeals for the Ninth Circuit stayed the Secretary's order pending its review of the case. After full briefing and oral argument, the court unanimously affirmed the Secretary's decision (Pet. App. A1–A36; 449 F. 2d 456).[3]

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[2] Additionally, the Administrator noted that Arizona's legal custody requirement fell most heavily on Arizona's Mexican-American and Indian populations whose cultural pattern included extended families, which were seldom attended by formal custody arrangements (Pet. App. B49–B50).

[3] The court of appeals continued its stay pending disposition of the instant petition for a writ of certiorari.

Arizona does not deny that its plan is inconsistent with the federal regulations in the four respects found by the Administrator. It contends, however, that the regulations are unauthorized by, or inconsistent with, the Act. However, as this Court stated in *Thorpe* v. *Housing Authority*, 393 U.S. 268, 277, fn. 28, Section 1102 of the Social Security Act, 42 U.S.C. 1302, grants "broad rule-making powers" to the Secretary. See also *Lewis* v. *Martin*, 397 U.S. 552, 559, recognizing "the deference due" HEW as "the agency charged with the administration of the Act." The court of appeals fully considered and rejected petitioner's specific challenges to the regulations, and we rely upon that court's comprehensive and well-reasoned opinion.[4]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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[4] The Ninth Circuit's holding on "disregard of earned income for AFDC" (Pet. App. A15–A19) is in accord with a recent decision of the Second Circuit on that identical issue. *Connecticut State Department of Public Welfare* v. *Department of Health, Education, and Welfare*, 448 F. 2d 209.

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